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IN THE

# Supreme Court of the United States

KENNETH ANGARONE AND THOMAS MCGANN,
*Petitioners*,

v.

JOSEPH P. IENCO,
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the absolute testimonial immunity that shields a witness from civil liability based on his testimony also immunizes a witness's failure to disclose prior to trial information that would contradict or impeach the witness's subsequent testimony.

## PARTIES TO THE PROCEEDING

The petitioners are Kenneth Angarone and Thomas McGann. The respondent is Joseph P. Ienco. The City of Chicago was also a party to the proceedings below, and therefore is technically a respondent in this Court, although the petition raises no issue relating to the judgment in favor of the City of Chicago.

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# Supreme Court of the United States

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KENNETH ANGARONE AND THOMAS MCGANN,
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v.

JOSEPH P. IENCO,
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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Chicago police officers Kenneth Angarone and Thomas McGann, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra* at 1a-12a), is reported at 286 F.3d 994 (7th Cir. 2002). The opinion of the district court (App., *infra* at 13a-25a), is reported at 148 F. Supp. 2d 938 (N.D. Ill. 2001).

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 12, 2002. A timely petition for rehearing was denied on June 20, 2002. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1) (2000).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Section 1 of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

## STATEMENT

In August 1994, respondent Joseph Ienco ("Ienco") and another individual traveled from New York to collect a debt owed to Ienco's employer by a Chicago businessman, Jerome Greenberg ("Greenberg"). App., *infra* at 2a. To that end, "they paid a visit to Greenberg at his Chicago office, where they talked tough to Greenberg about the money that he owed to Ienco's boss." *Ibid.* They then left, "intending to return to Greenberg's office to engage in more aggressively threatening behavior, primarily with the aid of firearms and

explosives." *Ibid.* When they returned, however, Greenberg had summoned the police, and Officers Angarone and McGann of the Chicago Police Department eventually recovered incriminating evidence during searches of Ienco's rental vehicle and hotel room. App., *infra* at 15a. Ienco was subsequently charged with various federal offenses. App., *infra* at 3a, 16a.

Prior to trial on the criminal charges against him, Ienco moved to suppress the evidence Officers Angarone and McGann had recovered, alleging that it had been obtained as a result of an illegal search and seizure. App., *infra* at 3a. Ienco's motion was denied after a hearing at which testimony from both officers was received. *Ibid.*[1] Ienco was subsequently convicted. *Ibid.* The court of appeals vacated the conviction and remanded for a new suppression hearing and trial based on evidentiary and instructional errors. See *United States v. Ienco*, 92 F.3d 564 (7th Cir. 1996). On remand, a new district judge held a suppression hearing at which both officers again testified, and then granted the motion to suppress, finding that the testimony of the officers was not credible, and that the officers had in fact searched and seized Ienco and his effects in violation of the Fourth Amendment. App., *infra* at 3a-4a. The United States appealed, and the court of appeals affirmed. See *United States v. Ienco*, 182 F.3d 517 (7th Cir. 1999).

Ienco then brought this civil action under 42 U.S.C. § 1983 (1994), pressing in the district court only a claim that the officers were liable for malicious prosecution. App., *infra* at 4a. The district court granted summary judgment against Ienco, concluding that he had failed to adduce sufficient evidence to satisfy the elements of a section 1983 malicious prosecution claim. App., *infra* at 4a-5a. On appeal, Ienco

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[1] At this hearing, Officer Angarone testified in person, and Officer McGann's testimony was admitted through a stipulation. App., *infra* at 3a.

abandoned his malicious prosecution theory, and instead argued that the officers had deprived him of his right to a fair trial under the Due Process Clause, relying on *Newsome v. McCabe*, 256 F.3d 747 (7th Cir.), supplemented on denial of rehearing, 260 F.3d 824 (7th Cir. 2001) (per curiam), an intervening decision of the court of appeals holding that police officers could be held liable under section 1983 on such a theory. App., *infra* at 6a-8a.

The court of appeals reversed the judgment in favor of Officers Angarone and McGann.[2] On the defense of testimonial immunity, the court of appeals ruled that that defense was inapplicable because the court believed that Ienco's "claims are not based on the officers' perjured testimony." App., *infra* at 10a. Instead, the court concluded that Ienco's claim was properly based on allegations that "the officers withheld exculpatory information and lied to the federal prosecutors who successfully indicted him." *Ibid.* The court of appeals held that the officers lacked immunity on that claim because "no absolute testimonial immunity attaches to the officers outside of trial, and they are proper defendants in this action." *Ibid.* (footnote omitted).[3]

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[2] The court concluded that Ienco's failure to pursue a due process claim in opposition to the motion for summary judgment in the district court did not waive that claim for purposes of appeal since it was premised on the intervening decision in *Newsome*. App., *infra* at 7a-8a.

[3] On the officers' additional defense of qualified immunity, the court of appeals wrote that if Ienco's "allegations are proved, the officers' conduct violated clearly established federal law which was known or should have been known by a reasonable officer in 1995." App., *infra* at 11a. The court of appeals affirmed the judgment in favor of the City of Chicago, observing that Ienco had adduced no evidence demonstrating the existence of any municipal custom or policy of encouraging or tolerating perjury such as would be required to establish municipal liability under section 1983. App., *infra* at 11a-12a.

## REASONS FOR GRANTING THE PETITION

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that the doctrine of absolute testimonial immunity shields police officers from civil liability for their testimony against an accused in a criminal prosecution. Ienco's section 1983 claim against Officers Angarone and McGann to recover damages for his prosecution and conviction fits squarely within this immunity doctrine, since they procured his prosecution and conviction only by virtue of their willingness and ability to testify against him. Under *Briscoe*, witnesses are shielded from liability even if they procure a conviction by supplying testimony later alleged to be incredible or even perjurious, and that is precisely what happened here. Nevertheless, the court of appeals, after noting that Ienco claimed that the officers had failed to disclose prior to trial facts that might have undermined their testimony, denied them immunity on the ground that "no absolute testimonial immunity attaches to the actions of the officers outside of trial . . . ." App., *infra* at 10a.

Plenary review of the judgment below is amply warranted. There is serious disagreement in the federal appellate courts about whether testimonial immunity is confined to the act of testifying, as the court of appeals held in this case, or extends to pretrial conduct that is aimed at producing allegedly perjured testimony. In fact, eight other circuits have rejected the Seventh Circuit's view that a witness's immunity cannot shield pretrial conduct; only the Second Circuit has taken a position consistent with the holding below. Review is all the more necessary because the holding below effectively destroys the doctrine of witness immunity; a section 1983 plaintiff can always refashion a claim based on allegedly perjured testimony as a claim that a witness committed pretrial misconduct by failing to disclose his intention to testify perjuriously prior to trial. Hence, the holding below creates an exception to immunity that virtually swallows the

rule. Accordingly, certiorari should be granted to determine whether the doctrine of witness immunity is, at least in practical effect, to survive, and to review a holding that leaves police officers exposed to the precise burdens of civil litigation and potential liability from which this Court decreed they were to be spared in *Briscoe*.

1. There is a serious disagreement in the lower courts on the question whether the doctrine of witness immunity recognized in *Briscoe* reaches pretrial conduct. The circuits disagree about whether testimonial immunity under *Briscoe* is confined to the act of testifying, or reaches pretrial conduct that has no independent impact on the defendant but is instead merely preparatory to immunized testimony.

*San Filippo v. U.S. Trust Co. of New Jersey, Inc.*, 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985), was the first appellate decision to consider whether the holding of *Briscoe* immunized alleged pretrial misconduct aimed at producing allegedly perjured testimony. In that case, the plaintiff brought a "§ 1983 claim not based on defendants' testimony, but on their alleged *conspiracy* with the [prosecutor] to present false testimony and to withhold exculpatory evidence in the course of criminal proceedings." *Id.* at 254 (emphasis in original). The court rejected the claim of immunity, concluding that the holding in *Briscoe* "was expressly limited to immunity for testimony given in judicial proceedings, and its rationale—to encourage witnesses to come forward with all they know—does not justify extending that immunity to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." *Id.* at 255.[4] This holding is echoed in the holding of the court of appeals in this case that "no absolute testimonial immunity

[4] *San Filippo* itself did not involve a claim made against police officers, but the court's reasoning was applicable to all section 1983 lawsuits, and was later specifically applied to deny immunity to police officers in *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994).

attaches to the actions of the officers outside of trial . . . ." App., *infra* at 10a. But only the Second and Seventh Circuits have taken this position. Eight other circuits have rejected such an approach to witness immunity.

For example, in *Miller v. Glanz*, 948 F.2d 1562 (10th Cir. 1991), the court considered the plaintiff's argument, relying on *San Filippo*, that "*Briscoe* should not extend to conspiracies to present false testimony." *Id.* at 1570. The court rejected that view, reasoning:

> Allowing criminal defendants to seek damages under § 1983 for *conspiracy* among state witnesses to offer false testimony would give rise to the same systemic concerns noted in *Briscoe*. Instead of suing state witnesses for perjured testimony, a defendant could simply transform the perjury complaint into an allegation of a conspiracy to do the same. Moreover, an extension of *Briscoe* prevents self-censorship on the part of witnesses due to the fear of civil liability.
>
> Most importantly, in *Briscoe*, the Court pointed to various "truth-finding safeguards of the judicial process" that decreased the likelihood that perjured testimony will significantly harm or alter a just outcome at trial. These safeguards also apply to attempted conspiracies to give perjured testimony. At trial, the co-conspirator witness subsequently must take an oath, be subjected to cross-examination, and be scrutinized for credibility by the trier of fact. Therefore, after employing the functional approach, we must conclude that the defendants are entitled to immunity under the circumstances of this case.

*Id.* at 1571 (emphasis in original) (citations omitted) (quoting *Briscoe*, 460 U.S. at 344-45). As the Tenth Circuit later reiterated: "[W]e have expressly repudiated *San Filippo* . . . ." *Hunt v. Bennett*, 17 F.3d 1263, 1267 (10th Cir.), cert. denied, 513 U.S. 832 (1994).

And the Tenth Circuit does not stand alone. At least seven other circuits have held that absolute testimonial immunity extends to pretrial misconduct aimed at producing perjured testimony. See *Mowbray v. Cameron County*, 274 F.3d 269, 277-78 (5th Cir. 2001), cert. denied, 122 S. Ct. 1912 (2002); *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d 1271, 1288-89 (11th Cir. 1999); *Watterson v. Page*, 987 F.2d 1, 9 (1st Cir. 1993); *McArdle v. Tronetti*, 961 F.2d 1083, 1085-86 (3d Cir. 1992); *Alioto v. City of Shiveley*, 835 F.2d 1173, 1174 (6th Cir. 1987); *Moses v. Parwatikar*, 813 F.2d 891, 892-93 (8th Cir.), cert. denied, 484 U.S. 832 (1987). In *Franklin*, for example, the Ninth Circuit held that meetings among prospective witnesses prior to trial in an effort to ensure that they testified consistently with each other were within the scope of testimonial immunity. See 201 F.3d at 1102. Similarly, in *Jones*, the Eleventh Circuit held that nontestifying police detectives' meetings with a potential witness in order to suborn perjured testimony were immunized. See 174 F.3d at 1288-89. In *Moses*, the Eighth Circuit recognized immunity even though the complaint alleged that "the conspiracy began long before [witness's] involvement in the case." 813 F.2d at 892. And in *Watterson*, immunity was recognized on allegations that the defendants "conspired . . . to present false testimony and to withhold material evidence from the court . . . ." 987 F.2d at 9. Each of these holdings is squarely inconsistent with the holding in *San Filippo*, as well as the holding below that "no absolute testimonial immunity attaches to the actions of the officers outside of trial . . . ." App., *infra* at 10a.[5]

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[5] The Seventh Circuit itself once took the position that pretrial misconduct aimed at producing perjured testimony was within the scope of testimonial immunity. See *House v. Belford*, 956 F.2d 711, 719-21 (7th Cir. 1992). In the decision below, the court of appeals did not even mention *House*, perhaps agreeing with Ienco's suggestion below that its holding had been undermined by the subsequent statement in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), cert. denied, 513 U.S. 1085

Accordingly, there is outright inconsistency in the circuits on the scope of testimonial immunity. The Second and Seventh Circuits have held that testimonial immunity does not reach pretrial conduct, while eight circuits have held it does. This conflict in the lower courts alone warrants plenary review of the decision below.[6]

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(1995), that "constitutional wrongs completed out of court are actionable even if they lead to immunized acts." *Id.* at 797. See App., *infra* at 19a n.8. We consider this case involves a constitutional violation "completed out of court" below. The Seventh Circuit, moreover, is not the only court of appeals to reverse its position on this issue. The First Circuit originally seemed to agree with the Second Circuit's view, see *Malachowski v. City of Keene*, 787 F.2d 704, 712-13 (1st Cir.), cert. denied, 479 U.S. 828 (1986), but later changed its position in *Watterson*, see 987 F.2d at 9.

[6] The court of appeals left open the possibility that even the officers' testimony could be denied immunity on remand under the so-called "complaining witness" doctrine. See App., *infra* at 10a n.9. This doctrine denies immunity to "one who procured the issuance of an arrest warrant . . . maliciously and without probable cause . . . ." *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986). On this point as well there is a split in the circuits. Two circuits have held that the complaining witness doctrine deprives only a witness's role in procuring charges against an accused of immunity but never deprives actual testimony of immunity. See *Jones*, 174 F.3d at 1287-88 & n.10; *Kulwicki v. Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992). Two other circuits have held that the complaining witness doctrine denies immunity for testimony only for malicious prosecution actions based on a witness's role in initiating a prosecution and not in other types of section 1983 actions. See *Moore v. McDonald*, 30 F.3d 616, 619-20 (5th Cir. 1994); *Anthony v. Baker*, 955 F.2d 1395, 1399-1400 (10th Cir. 1992). Although the Seventh Circuit was silent on this point in the opinion below, it had also taken this position previously. See *Curtis v. Bembenek*, 48 F.3d 281, 285-86 (7th Cir. 1995). But two circuits have concluded without qualification that the complaining witness doctrine deprives a witness of immunity even for testimony itself. See *Harris v. Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998); *White v. Frank*, 855 F.2d 956, 959-61 (2d Cir. 1988). Thus, the potential applicability of the complaining witness doctrine to the officers' actual testimony only reinforces the need for plenary review, since the circuits are in conflict on how that doctrine is to be applied.

2. The holding below is also utterly irreconcilable with the doctrine of witness immunity and this Court's application of that doctrine in *Briscoe*.

The litigation before the Court in *Briscoe* was brought by three individuals who alleged that police officers had deprived them of their right to due process of law by committing perjury in the course of criminal proceedings. See 460 U.S. at 326-27. Considering the officers' defense of witness immunity, the Court observed that the common law had afforded witnesses absolute immunity from damages based on their testimony because, in the absence of immunity, "witnesses might be reluctant to come forward and testify," and "once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Id.* at 333. The Court found nothing in the legislative history of section 1983 suggesting that Congress had wished to discard this rule when enacting that statute. See *id.* at 336-41. The Court also refused to carve out an exception to the traditional rule of immunity for police witnesses despite their special responsibilities to the administration of justice, since exposing them to liability would impose enormous burdens on law enforcement officers and agencies. See *id.* at 342-45.[7]

In the decision below, the court of appeals endeavored to reconcile its holding with *Briscoe* on the basis that Ienco's due process claim could be premised not on the officers' testimony but upon allegations that "the officers withheld exculpatory information and lied to the federal prosecutors who successfully indicted Ienco." App., *infra* at 10a. The court added, citing this Court's decision in *Brady v.*

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[7] Although *Briscoe* itself involved trial testimony, the lower courts have universally understood its holding to reach testimony at pretrial evidentiary hearings as well. See, *e.g.*, *Curtis*, 48 F.3d at 284-85; *Moore*, 30 F.3d at 619-20; *Daloia v. Rose*, 849 F.2d 74, 75-76 (2d Cir.) (per curiam), cert. denied, 488 U.S. 898 (1988); *Holt v. Castaneda*, 832 F.2d 123, 125-27 (9th Cir. 1987), cert. denied, 485 U.S. 979 (1988).

*Maryland*, 373 U.S. 83 (1963), that "[n]either the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity." App., *infra* at 10a. But nothing in *Brady* or its progeny lends any support to the view that Ienco could advance a due process claim separate from the officers' immunized testimony.

*Brady* itself involved no claim of testimonial immunity from civil liability; for that reason alone it provides scant support for the holding below. Nor does *Brady* suggest that a due process claim can be based on pretrial misconduct alone and apart from what occurs at trial. In *Brady*, this Court held that the suppression of exculpatory evidence by the prosecution "violates due process where the evidence is material either to guilt or to punishment," not to achieve "punishment . . . for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S. at 87. The right recognized in *Brady* thus turns on the fairness of an accused's trial, not the nature of pretrial proceedings. In fact, "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). Cf. *Landrigan v. City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("We do not see how the existence of a police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws."). That is why this Court has taken pains to point out that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Accord, *e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995).

Thus, a due process claim under *Brady* necessarily depends on whether an accused's trial was unfair—not merely on whether someone suppressed exculpatory evidence prior to

trial. And here, the only asserted constitutional infirmity at Ienco's trial was the result of the officers' immunized testimony—if the officers had not testified about their search and seizure of Ienco and his effects, there would have been nothing unfair in the constitutional sense about Ienco's suppression hearing and trial. Thus, no *Brady* claim is possible here except one that rests on the officers' immunized testimony.[8]

To be sure, Ienco claims that the officers engaged in pretrial misconduct in the criminal proceedings against him—the officers allegedly falsified police reports and failed to disclose anything that might have suggested that their account of Ienco's arrest was false. This pretrial misconduct, while reprehensible, is of no constitutional significance in itself. As we explain above, the rule of *Brady* is not designed to punish misconduct, but to preserve the right to a fair trial. And the fairness of Ienco's trial was not compromised except by the officers' immunized testimony. No pretrial misconduct could produce a due process violation—a trial that was unfair in the constitutional sense—unless the officers testified at trial. Ienco's due process claim accordingly cannot be separated from the officers' immunized testimony, and for just that reason it founders upon their testimonial immunity. As the

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[8] Aside from *Brady*, the only other authority that the court of appeals cited in support of its holding was *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). See App., *infra* at 10a. In *Jones*, however, none of the police defendants was alleged to have testified falsely, and no claim of witness immunity was before the court. See 856 F.2d at 992-96. Moreover, the claim in that case was for arrest and prosecution without probable cause rather than the denial of the right to a fair trial. See *id.* at 922. Indeed, the court in *Jones* took pains to acknowledge that "we do not reach the question whether damages could ever be awarded for such a [*Brady*] violation." *Id.* at 996. Moreover, the Seventh Circuit's decision in *Newsome v. McCabe*, on which Ienco relied to support his due process claim, itself cited only *Brady* and *Jones* to support its holding. See *Newsome*, 256 F.3d at 753.

Ninth Circuit put it when holding that immunity reached even pretrial meetings between witnesses in order to coordinate their anticipated testimony at trial, "because [the witness]'s alleged conspiratorial behavior is inextricably tied to her testimony, we find that she is immune from damages." *Franklin*, 201 F.3d at 1102. Or, as the Eleventh Circuit put it in *Mastroianni v. Bowers*, 173 F.3d 1363 (11th Cir. 1999), immunity bars claims that "are supportable . . . only by consideration of the actual contents of the allegedly perjured testimony . . . ." *Id.* at 1367.[9]

The holding below is also utterly inconsistent with this Court's decision in *Briscoe*, because it so completely eviscerates the immunity recognized in that case. The kind of pretrial conduct that the court of appeals identified here will always be present in cases where a plaintiff alleges police perjury. Under the holding below, whenever a police officer fails to disclose to prosecutors during pretrial interviews that he intends to commit perjury when he testifies at trial, a plaintiff can successfully argue that his claim evades testimonial immunity because the officer "withheld exculpatory information and lied to the . . . prosecutors . . . ." App., *infra* at 10a. But since "a witness rarely prepares her

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[9] The officers' underlying search and seizure of Ienco and his effects, of course, could be actionable under section 1983 if it violated the Fourth Amendment. See, *e.g.*, *Malley*, 475 U.S. at 340-41. Moreover, the officers would lack testimonial immunity on such a claim, since that doctrine does not reach nontestimonial conduct. See, *e.g.*, *Paine v. City of Lompoc*, 265 F.3d 975, 981-82 (9th Cir. 2001); *Jones v. Cannon*, 174 F.3d at 1289-90; *Spurlock v. Satterfield*, 167 F.3d 995, 1001-04 (6th Cir. 1999). Here, in fact, in the criminal proceedings, the court of appeals held that Ienco's Fourth Amendment rights were violated by the officers' search and seizure of Ienco and his effects. See *United States v. Ienco*, 182 F.3d 517 (7th Cir. 1999). But although a Fourth Amendment claim against the officers based on the underlying search and seizure would not be barred by testimonial immunity, it was time barred, as the court of appeals acknowledged. See App., *infra* at 11a.

testimony on her own," *Mowbray*, 274 F.3d at 277 (quoting *Franklin*, 201 F.3d at 1101-02), and police officers rarely announce their intent to testify perjuriously to prosecutors in their pretrial meetings, the exception to immunity crafted by the court of appeals effectively swallows the rule of immunity announced in *Briscoe*.

Indeed, the circuits that have extended *Briscoe*'s holding to pretrial misconduct have done so based on their recognition that any other result would enable plaintiffs always to eviscerate immunity by focusing on the witness's alleged pretrial scheme to commit perjury rather than on their subsequent testimony. See, *e.g.*, *Mowbray*, 274 F.3d at 277; *Franklin*, 201 F.3d at 1101; *Jones*, 174 F.3d at 1289; *Miller*, 948 F.2d at 1571. This Court has also recognized that claims based on the use of perjured testimony can always be recharacterized as based on the suppression of exculpatory evidence, and for that reason the immunity for the former would be wholly undermined if it does not reach the latter as well. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court rejected an argument that prosecutorial immunity should extend to the knowing use of perjured testimony but not to a prosecutor's pretrial failure to disclose exculpatory information about that testimony to the defense, explaining that

> the distinction is not susceptible of practical application. A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested . . . . Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

*Id.* at 431 n.34. See also *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead

of the absolutely immune actions themselves."). The same reasoning applies here. Under the holding below, immunity for testimony is eviscerated by permitting section 1983 plaintiffs to reframe claims based on perjured testimony as based instead on the failure of police witnesses to disclose prior to trial facts inconsistent with their subsequent testimony.

3. Plenary review of the decision below is particularly urgent because that decision exposes law enforcement officials to the precise burdens of litigation from which this Court decreed they should be spared in *Briscoe*.

While burdening police officers who have allegedly failed to disclose exculpatory information that would undermine their subsequent testimony might seem desirable at first blush, this result ignores the powerful policy considerations that motivated this Court to recognize witness immunity in the first place. Criminal defendants who have been acquitted will frequently believe that police officers who testified against them lied, and a rule permitting the imposition of liability against officers who allegedly failed to disclose prior to trial that they intended to testify falsely will generate an enormous volume of litigation and impose a concomitantly enormous burden on law enforcement officials, as well as the judicial system itself. The Court explained in *Briscoe*:

> [T]o the extent that traditional reasons for witness immunity are less applicable to governmental witnesses, other considerations of public policy support absolute immunity more emphatically for such persons than for ordinary witnesses. Subjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties.

Section 1983 lawsuits against police officer witnesses, like lawsuits against prosecutors, "could be expected with some frequency." Police officers testify in scores

> of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the state's official witnesses. As the files in this case show, even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources.
>
> This category of § 1983 litigation might well impose significant burdens on the judicial system and on law-enforcement resources. As this Court noted when it recognized absolute immunity for prosecutors in *Imbler*, if the defendant official "could be made to answer in court each time [a disgruntled defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." To some degree the individual's burden might be alleviated by the government's provision of counsel, but a case that goes to trial always imposes significant emotional and other costs on every party litigant.

460 U.S. at 342-44 (citations and footnote omitted) (quoting *Imbler*, 424 U.S. at 425) (brackets in original).

The Court's warning in *Briscoe* about the crushing burdens the law enforcement community will face if it must defend suits complaining about allegedly perjurious testimony is fully applicable to this case. Surely the staggering volume of litigation that will likely be brought against law enforcement officials under the holding below must, at a minimum, distract those officials from their important duties, and divert scarce public resources away from crime fighting to the defense of civil litigation.[10] To avoid that outcome, plenary review is necessary.

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[10] Moreover, the risk of personal liability for officers based on the performance of their police duties and its concomitant chilling effects on officers is quite real; in Illinois, for example, as is common in most states, local governments cannot indemnify public employees for awards of punitive damages against them. See 745 ILCS 10/2-102 (2000). Even to the extent that law enforcement officials may be indemnified for judg-

4. For these reasons, review of the decision below is fully warranted; and, in particular, it is warranted at this juncture. As we explain above, the doctrine of witness immunity is intended to spare public officials from the burdens of litigation, not only to protect them against judgments. Thus, if this and other cases must be litigated on the merits of the plaintiffs' claims, the critical protection that this immunity doctrine affords from the burdens of trial itself will be irrevocably lost, even if Officers Angarone and McGann and other section 1983 defendants ultimately manage to win these cases on their merits. Thus, although the judgment below is interlocutory in the sense that it remands this case for further proceedings, there is nothing interlocutory about the court of appeals' determination that police officers are to be denied protection from the burdens of litigation identified in *Briscoe* on the type of claim that is brought here.[11] And because of the breadth of the claim on

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ments against them as well as their litigation expenses, those costs are merely shifted to the taxpaying public, creating many anomalies not present in ordinary litigation, since the financial burden of litigation ultimately falls on the taxpaying public rather than the wrongdoers or even their employer. See generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000).

[11] Indeed, this Court has frequently granted certiorari to review decisions that deny public officials immunity from trial, even if further proceedings are envisioned under the judgment of the court of appeals. That is perhaps most evident in this Court's treatment of the defense of qualified immunity, which is also intended to spare public officials the burdens of discovery and trial. See, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 525-29 (1985). In six of its past seven Terms, the Court has agreed to review decisions denying qualified immunity even though further proceedings in the district court were required under the court of appeals' judgment. See *Christopher v. Harbury*, 122 S. Ct. 2179 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001); *Conn v. Gabbert*, 526 U.S. 286 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Richardson v. McKnight*, 521 U.S. 399 (1997); *Behrens v. Pelletier*, 516 U.S. 299 (1996).

which the court of appeals denied immunity, the holding below effectively undoes the holding in *Briscoe*, leaving plaintiffs free in virtually every case to recharacterize a claim based on immunized testimony as a claim based on an officer's failure to disclose exculpatory evidence prior to trial. Accordingly, to preserve the testimonial immunity of police officers from practical annihilation, plenary review is required.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

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No. 01-2395

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JOSEPH IENCO,
*Plaintiff-Appellant,*

v.

CITY OF CHICAGO, a municipal corporation, P.O. Kenneth Angarone, individually and in his official capacity as a member of the Chicago Police Department, and P.O. Thomas McGann, individually and in his official capacity as a member of the Chicago Police Department,
*Defendants-Appellees.*

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Argued Feb. 13, 2002.
Decided April 12, 2002.
Rehearing Denied June 20, 2002.

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Before COFFEY, MANION, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.*

Joseph Ienco was convicted of various federal weapons and extortion charges in April 1995. After raising several successful constitutional challenges to the manner of his arrest, his conviction was overturned and the indictment was dismissed. Seeking compensation for what he believed to be a wrongful prosecution caused by the actions of defendants City of Chicago ("the City") and two City police officers, Ienco brought an action under 42 U.S.C. § 1983. The district

court, in granting summary judgment for defendants, concluded that Ienco's state and federal malicious prosecution claims failed on the merits as a matter of law, because he could not prove that the defendants denied his substantive due process rights. Ienco appeals. During the pendency of his appeal, we decided *Newsome v. McCabe*, 256 F.3d 747 (7th Cir.2001), which held that federal malicious prosecution claims should not be examined under a theory of substantive due process, but must instead be analyzed under the due process clause directly. In light of *Newsome*, we reverse judgment as to the individual officers but affirm judgment as to the City.

## I. BACKGROUND

### A. Facts

Joseph Ienco operated as a real estate broker and rent collector, along with his associate Gregory Iovine. On the side, Ienco doubled as a debt collection enforcer. In August 1994, Ienco and Iovine were sent to collect payment from a Chicago businessman, Jerome Greenberg, who apparently owed a debt to Ienco's boss, a clothing importer. Ienco and Iovine traveled to Chicago and secured a hotel room and rental car. Shortly thereafter, they paid a visit to Greenberg at his Chicago office, where they talked tough with Greenberg about the money that he owed to Ienco's boss. Ienco and Iovine left, intending to return to Greenberg's office to engage in more aggressively threatening behavior, primarily with the aid of firearms and explosives.

When Ienco and Iovine returned to Greenberg's building, Greenberg saw them and called the police. Defendant Chicago police officers Kenneth Angarone and Thomas McGann soon arrived at the scene. What happened next is the source of much dispute. In brief, Ienco claimed that the officers conducted an unlawful search and seizure. The officers claimed that they received consent for all search and

seizure activity. What is not in dispute is that the search and seizure of Ienco and his associate began a chain of events that led the officers to discover that Ienco and Iovine's rental vehicle contained a variety of dangerous weapons. Acting with Iovine's tacit approval, government agents also discovered more incriminating evidence in Ienco and Iovine's hotel room.

B. District Court Procedural History

Ienco was charged with various federal crimes regarding his cache of illegal weapons and explosives and his attempts at extortion. As one might expect, he moved to suppress the physical evidence seized following his arrest, arguing that it was the product of an illegal search and seizure. At trial, these issues were initially discussed at length in a suppression hearing before Judge Duff. Judge Duff denied the motion to suppress, finding that the testimony of Officer Angarone was "complete, consistent, informed, careful, [and] professional." As a result of the denial of the motion to suppress, Iovine became a witness against Ienco--who was promptly convicted at trial. Officer Angarone testified at the suppression hearing and at trial. Officer McGann offered a stipulation for the suppression hearing and proffered testimony that was not introduced at trial. Ienco was sentenced to 425 months in prison, and he appealed.

In *United States v. Ienco*, 92 F.3d 564 (7th Cir.1996) ("*Ienco I*"), we reversed and remanded, finding that the district court committed several prejudicial errors, which required a new suppression hearing and trial. Pursuant to Circuit Rule 36, we assigned the matter to Judge Coar.

Judge Coar conducted a thorough review of the record on the motion to suppress. Both officers testified at the new suppression hearing. After weighing all available information, Judge Coar found numerous inconsistencies in

the officers' stories, concluding that "[i]n short, Angarone and McGann lied."[1] Appropriately, he suppressed the evidence. The government appealed.[2]

We affirmed. In *United States v. Ienco*, 182 F.3d 517 (7th Cir.1999) ("*Ienco III*"), we found that suppression of all physical evidence was warranted, because the officers lacked reasonable suspicion for a *Terry* stop and also unlawfully arrested Ienco. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We did not extensively address Judge Coar's factual findings that the officers lied. However, we did note that the government did not appeal Judge Coar's findings of fact as to what actually occurred, effectively conceding that the officers' testimony was not to be believed. *See Ienco III*, 182 F.3d at 524, n. 4.

After our decision in *Ienco III*, the government dismissed the indictment. Shortly thereafter, Ienco brought the current action. Although Ienco initially alleged a host of constitutional violations, he eventually focused on a single issue: whether the defendants were liable under a malicious prosecution theory pursuant to Illinois state and federal law.

The district court, applying our precedent, concluded on summary judgment that the undisputed material facts in this case did not permit Ienco to pursue a malicious prosecution theory against either the officers or the City. The district court correctly found that Ienco failed to prove that the proceedings were terminated in a manner indicative of his innocence, as

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[1] In the criminal case, the City chose not to dispute Judge Coar's findings of fact on appeal. Likewise, in this case, the government's admissions, both for summary judgment and at oral argument, leave us with no doubt that at least some portion of the officers' testimony was fabricated.

[2] Although we entered an intervening opinion on certain evidentiary matters, *United States v. Ienco*, 126 F.3d 1016 (7th Cir.1997) ("*Ienco II*"), those matters were ultimately resolved by the final appeal.

required by state law. *See Joiner v. Benton Community Bank*, 82 Ill.2d 40, 45, 411 N.E.2d 229 (1980). Since it was settled that a valid state claim was a necessary prerequisite for a Section 1983 claim of malicious prosecution, the district court held that the resolution of the state law claim resolved Ienco's federal claims as well. *See Cervantes v. Jones*, 188 F.3d 805, 809 (7th Cir.1999); *Washington v. Summerville*, 127 F.3d 552, 557 (7th Cir.1997). Because Ienco's Section 1983 claim was thus entirely foreclosed, summary judgment was entered for the defendants. This appeal followed.

## II. ANALYSIS

We review the district court's decision granting summary judgment de novo. *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 727 (7th Cir.2001). As we must, we review the evidence in the light most favorable to Ienco as the nonmoving party, and we make all reasonable and justifiable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

### A. *Newsome* and Ienco's Malicious Prosecution Claim

The standards for a successful Section 1983 action against local police officers or a municipality are well known. To prove the officers' liability, Ienco must show that (1) he was deprived of a federal right and (2) that the deprivation was imposed upon him by one or more persons acting under color of state law. *See Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). To establish liability for the City of Chicago, Ienco must prove that: (1) he suffered a deprivation of a federal right; (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority for the City; which (3) was the proximate cause of his injury. *See Monell v. New York City Department of Social Services*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Frake v. City of Chicago*, 210 F.3d 779, 781 (7th Cir.2000).

At the outset, there is much agreement about Ienco's claims before us. First, all parties agree that the state law claims were properly decided by the district court. This is clear, because Ienco cannot meet his burden of proving under Illinois law that the criminal proceedings terminated in a manner indicative of his innocence. Likewise, the parties agree that our intervening decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir.2001), discussed below, effectively bars Ienco's malicious prosecution claim as presented to the district court on summary judgment. Therefore, the principal question remaining is whether Ienco's allegations, coupled with our intervening decision in *Newsome*, provide Ienco with opportunity to pursue a constitutional remedy sufficient to defeat summary judgment. As we explain below, we conclude that such a remedy exists. We must also address whether, at this stage, the officers are entitled to absolute or qualified immunity. As we also explain below, we find that they are not.

The unique procedural posture of this case requires some elaboration. As the law existed at the time this case was filed, the district court's disposition of the state law malicious prosecution claim would have ended the analysis, and summary judgment would have been properly awarded to the defendants. However, after the district court granted summary judgment in favor of the officers, we decided *Newsome*.[3]

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[3] *Newsome* explicitly rejected portions of four of our recent opinions. As such, the District Court should not be faulted for following the law as we had previously explained it. *See Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir.1996) (noting that the question of which constitutional amendment was implicated in a Section 1983 malicious prosecution claim was still "somewhat unclear").

In *Newsome*, we withdrew dicta in four of our previous opinions [4]—which had each been understood to permit Section 1983 malicious prosecution claims but bar similar claims asserting that defendants' actions violated due process rights. *Newsome* clarified the proper analysis, by holding that Section 1983 provides a remedy for certain forms of trial-based government misconduct based on violations of due process—not claims of malicious prosecution. Specifically, we held that "claims of malicious prosecution should be analyzed not under the substantive due process approach [embodied by the malicious prosecution formula], but under the language of the Constitution itself." *Newsome*, 256 F.3d at 751. *Newsome* teaches that, under these circumstances, the plaintiff must allege that the officers withheld information or evidence necessary for the fair and impartial trial guaranteed by the U.S. Constitution. Ultimately, we held that Newsome's constitutional claim of malicious prosecution failed as a matter of law. Nonetheless, we recognized that Newsome did have a federal due process claim—that taking the facts as alleged "he did not receive a fair trial if the prosecutors withheld material exculpatory details." *Newsome*, 256 F.3d at 752.

Because our decisions prior to *Newsome* had been reasonably read to foreclose a due process action under facts similar to those in this case, we did not penalize Newsome for failing to convincingly argue such a cause of action at summary judgment. Similarly, under the facts of this case and the law at the time, Ienco had only one valid

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[4] *Cervantes v. Jones*, 188 F.3d 805, 809 (7th Cir.1999); *Sneed v. Rybicki*, 146 F.3d 478, 480 (7th Cir.1998); *Washington v. Summerville*, 127 F.3d 552, 558-59 (7th Cir.1997); *Reed v. Chicago*, 77 F.3d 1049, 1051 (7th Cir.1996). Our decisions in each of those cases attempted to decipher the Supreme Court's opinion in *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), a subject addressed at length in *Newsome*, 256 F.3d at 750-51.

constitutional claim to pursue—malicious prosecution.[5] After *Newsome*, Ienco still has only one timely constitutional claim to pursue—but it is for a violation of his due process rights under the 14th Amendment. Because *Newsome* was an intervening change in the law that benefits Ienco, he is entitled to take advantage of it on remand. *See, e.g., Molnar v. Booth*, 229 F.3d 593, 599 (7th Cir.2000). On remand, Ienco should be permitted to amend his complaint to include allegations relevant to a viable due process claim under *Newsome*.

B. Officers' Defenses—Waiver and Immunity

Notwithstanding our disposition of Ienco's constitutional remedy, the defendant officers contend that summary judgment was appropriate for three additional reasons, because: (1) Ienco failed to present a due process argument to the court below; (2) the officers are entitled to absolute testimonial immunity; and (3) the officers' conduct was not explicitly proscribed by our previous opinions.[6] We reject each of these contentions in turn.

1. Waiver of due process claim

Although the officers contend that Ienco did not properly raise his due process claim, we disagree. First, Ienco's complaint was sufficiently detailed to put the defendants on notice of his due process claim, and he explicitly alleged that

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[5] Our district courts consistently interpreted our opinions prior to *Newsome* in accordance with Ienco's strategy in the district court below. *See, e.g., Ewing v. O'Brien*, 60 F.Supp.2d 813, 817 (N.D.Ill.1999) ("no court has yet agreed with the notion that reconciling *Albright* with Seventh Circuit precedent forecloses a malicious prosecution claim under § 1983").

[6] It is not seriously disputed that Ienco's due process claim arose only when proceedings were terminated in his favor. As such, the timeliness of his claim is not at issue. *See Sneed v. Rybicki*, 146 F.3d 478 (7th Cir.1998).

"the acts complained of deprived plaintiff of his right . . . not to be deprived of liberty without due process of law." *Complt.* at 98. The defendants' response and motion to dismiss explicitly recognized Ienco's due process claim, because they responded that "plaintiff cannot base his claim against City upon allegations of a due process violation." *City resp.* at 7.

Further, as the district court recognized in its detailed and thorough opinion, it would have been a futile effort for Ienco to seriously pursue a due process claim prior to *Newsome.*[7] To that end, after the initial stages of this case were heard before the district court, Ienco conceded that *Smart v. Board of Trustees of Univ. of Illinois*, 34 F.3d 432 (7th Cir.1994) effectively prohibited a malicious prosecution claimant from proceeding under the due process clause directly—a path that we explicitly set out for the first time in *Newsome. See Smart*, 34 F.3d at 434 (holding that a malicious prosecution claimant's "only constitutional remedy is under the Fourth Amendment (as made applicable to the states by the Fourteenth) and not under the due process clause directly"). Under these circumstances, we decline to hold that Ienco waived his due process claim.

2. Absolute Immunity

Next, the officers claim that they are entitled to absolute immunity because their alleged perjury is protected as a matter of law—both before and during Ienco's criminal trial proceedings. *See Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Ienco contends that this view of the case is too narrow: he alleges that the officers actively withheld testimony and evidence—thus placing their conduct outside of the safety of trial-based immunity. We agree with the officers' general statement of law. Nonetheless, as Ienco properly contends, our inquiry does not end there.

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[7] *See Memorandum of Summary Judgment*, fn. 1.

If Ienco were merely claiming damages based upon the officers' perjured testimony, the officers would be entitled to absolute immunity. *See Curtis v. Bembenek*, 48 F.3d 281, 285 (7th Cir.1995). However, Ienco's claims are not based upon the officers' perjured testimony. Instead, he argues that the officers withheld exculpatory information and lied to the federal prosecutors who successfully indicted him. Neither the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir.1988).[8] Therefore, no absolute testimonial immunity attaches to the actions of the officers outside of trial, and they are proper defendants in this action.[9]

3. Qualified Immunity

Finally, there is the familiar matter of qualified immunity. To determine if immunity attaches to the actions of the officers, we undertake the two-part qualified immunity test described most recently in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). As *Saucier* teaches, first we ask whether Ienco has made out a violation of a

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[8] Contrary to counsel's argument before us, the concerns raised in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir.1994), are not implicated here. Unlike the facts in *Buckley*, Ienco alleges that the officers misled Ienco as well as the prosecutors and the Federal Bureau of Investigation. Such conduct is not protected by absolute immunity.

[9] Because plaintiff's claims ultimately rest in part on conduct that occurred before and after trial, we need not decide at this point whether and to what extent the complaining witness exception applies. The district court is best equipped to handle this fact-intensive issue. *See Cervantes v. Jones*, 188 F.3d 805, 809-10 (7th Cir.1999) (discussing police officer immunity when officers act as complaining witnesses at trial).

constitutional right. Second, we ask whether that right was clearly established at the time that the disputed conduct took place.

As to the first prong of *Saucier*, we note that Judge Coar's meticulous and unchallenged factual findings demonstrate that the officers engaged in conduct that violated the Fourth Amendment and could also have violated Ienco's 14th Amendment due process rights. *See Jones v. City of Chicago*, 856 F.2d at 994 (noting "at some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause"). Ienco's Fourth Amendment claims expired two years after his arrest. *See Newsome*, 256 F.3d at 749. Accordingly, his due process claims are limited to the officers' actions (or non-actions) that occurred following his arrest and only to those actions that were not protected by testimonial immunity. As to *Saucier*'s second prong, if Ienco's allegations are proved, the officers' conduct violated clearly established federal law which was known or should have been known by a reasonable officer in 1995. *See, e.g., Jones v. City of Chicago*, 856 F.2d at 992. Therefore, in order to determine if the officers are entitled to qualified immunity, we remand this fact-intensive issue to the district court to determine if the officers engaged in conduct that violated Ienco's due process rights.

C. City's Liability

Given our reversal of summary judgment as to the officers, Ienco contends that we must similarly reverse the district court's judgment in favor of the City. He is mistaken. In order to establish municipal liability under Section 1983, the plaintiff must prove that a "custom or policy of the City was a cause of the plaintiff's injury." *Jones v. City of Chicago*, 856 F.2d at 995; *see also Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d 1316 (7th Cir.1993).

True, Ienco's complaint made bare-bones allegations about the City's customs and policies—in general. However, Ienco introduced no material evidence at summary judgment that Officers Angarone or McGann were acting pursuant to an official custom or policy of the City of Chicago. We also note that nowhere has Ienco suggested that the actions of Officers Angarone or McGann extended beyond their role in his particular case. *See Williams v. Heavener*, 217 F.3d 529, 532 (7th Cir.2000) ("Ordinarily, one incident is not sufficient to establish a custom that can give rise to *Monell* liability.") Therefore, we affirm judgment as to the City.

## III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court as to the City of Chicago, and REVERSE the judgment of the district court as to Officers Angarone and McGann and REMAND the case for further proceedings.

## APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

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No. 00 C 3831

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JOSEPH IENCO,

*Plaintiff,*

v.

CITY OF CHICAGO, a municipal corporation, P.O. Kenneth Angarone, individually and in his official capacity as a member of the Chicago Police Department, and P.O. Thomas McGann, individually and in his official capacity as a member of the Chicago Police Department,

*Defendants.*

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May 2, 2001

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MEMORANDUM OPINION AND ORDER

CASTILLO, *District Judge.*

Joseph Ienco filed this lawsuit under 42 U.S.C. § 1983, claiming that the City of Chicago and Police Officers Keith Angarone and Thomas McGann violated Ienco's civil rights by subjecting him to malicious prosecution. Ienco also asserts unspecified violations of his rights under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments, and a pendent state law claim of malicious prosecution.[1] Defendants moved

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[1] Ienco failed to develop any of his claims under the First, Fourth, Fifth, or Eighth Amendments in his responsive pleadings, and later withdrew "such claims [under the First, Fifth, and Eighth Amendments]

for summary judgment on all claims pursuant to Fed.R.Civ.P. 56, on the grounds that Ienco failed to state either a federal or state law claim for malicious prosecution and that Ienco's other claims are either time-barred or unsupported by the alleged facts. For the reasons stated below, we grant Defendants' motion for summary judgment on all claims.

## RELEVANT FACTS

In August 1994, Ienco and Gregory Iovine, a business associate of Ienco's, traveled from New York to Chicago to meet with Jerome Greenberg. They did so at the request of a third party to whom Greenberg allegedly owed a business debt. According to Iovine, he and Ienco traveled by Amtrak train because train stations, unlike airports, do not have metal detectors. This was important because Ienco and Iovine carried a .357 magnum revolver, a .380 caliber semiautomatic pistol equipped with a silencer, forty-five rounds of ammunition for the guns, and one pound of explosive powder along with fuses and other components reportedly suitable for use in constructing a pipe bomb.

On August 29, 1994, Ienco and Iovine twice sought to meet with Greenberg, both times without an appointment and without Greenberg's permission to enter his office. On their first attempt, they succeeded in entering Greenberg's office and recommended that he repay the alleged debt. Greenberg requested that the two leave his office and said if they did not he would call the police. Ienco and Iovine left Greenberg's office, telling him that he would see them again. (R. 17, Defs.' 56.1(a)(3) Statement of Facts, Tab I, Indictment at 4, ¶ 8.)

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as being outside the scope of a malicious prosecution claim." (R. 13, Pl.'s Mem. in Opp'n to Def. City of Chicago's Mot. to Dismiss at 17 n. 5.) Therefore, we find that he has abandoned and waived these claims. Moreover, the Court independently finds that Ienco could not have sustained any of these constitutional claims had he pursued them.

On Ienco and Iovine's second attempt to meet with him, Greenberg spotted them on the building's closed-circuit television security system and had his secretary call the police. Officers Angarone and McGann responded to the call. Angarone and McGann stopped Ienco and Iovine outside the building, searched them, and detained the two men by placing them in the back of the squad car while the officers investigated the incident.

The parties differ as to the timing of this event. Ienco states that he and Iovine were detained by the police immediately upon the officers' arrival at the building, before the officers had any information linking them to the reported disturbance within the building. The police officers contend that they first conferred with a witness who identified Ienco and Iovine and then detained them when they exited the building. Both sides agree that Ienco and Iovine remained in the back of the squad car for approximately one-half hour while the officers conferred with Greenberg.

During that half-hour, the officers interviewed Greenberg and another witness, and Greenberg signed a complaint alleging criminal trespass against Ienco and Iovine. The police officers then informed the two men that they were under arrest and drove them to the police station.

The police officers later returned to the scene of the arrest to look for a rental car that matched a set of keys the officers acquired from Ienco.[2] They located the car and searched it, finding a briefcase containing the two firearms. Both guns were loaded. The explosives were found during a search of Ienco's hotel room on August 30, 1994.

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[2] The police officers allege that they found the car keys hidden in the back of the squad car. Ienco, however, alleges that the police officers confiscated the car keys at the time they searched him. Iovine reportedly had told the officers that he and Ienco had taken a taxi to Greenberg's office.

The police officers filed a report of the arrest, and, on August 31, turned the investigation over to a Special Agent of the Federal Bureau of Investigation. The Special Agent filed a federal complaint, and in October a federal grand jury was convened. The grand jury eventually indicted Ienco and Iovine on five counts of violating federal law.

Ienco and Iovine moved to suppress various pieces of evidence found subsequent to their arrest, including the firearms, the explosives, and a post-arrest statement by Iovine. The motion was denied, and Iovine subsequently entered into a plea agreement with the government. Ienco elected to proceed to trial and was convicted of five counts of violating federal law, including conspiracy to commit extortion, interstate travel in aid of racketeering, and using or carrying firearms during and in relation to a crime of violence.

Ienco appealed both his criminal conviction and the denial of his motion to suppress evidence. The Court of Appeals found errors at both the suppression hearing and at trial. The critical question at the suppression hearing, the Court of Appeals found, was whether the officers had probable cause to arrest Ienco and Iovine at the moment they placed them in the squad car because their detention in the car was tantamount to an arrest. Ienco and the officers told different versions of the events leading up to that moment. If the court accepted the officers' version, the arrest was valid and the subsequently-recovered evidence was admissible. On the other hand, if Ienco's version was believed, the arrest was without probable cause and the evidence acquired as a result of that arrest would then be inadmissible "fruit of the poisoned tree." *See Wong Sun v. United States*, 371 U.S. 471, 484-86, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *United States v. Ingrao*, 897 F.2d 860, 866 (7th Cir.1990).

At the suppression hearing, Ienco's attorney called a witness who previously had given deposition testimony that

tended to corroborate Ienco's version of the arrest. On direct examination, that witness instead said that she had been distracted by a telephone call and had not actually seen the early stages of the incident. The attorney attempted to treat this witness as adverse and impeach her by using leading questions, a technique that was proper under Fed.R.Evid. 607. The trial judge, nevertheless, sustained the government's objection to this technique and sanctioned Ienco's attorney by striking all of the witness's testimony. The Court of Appeals found this was prejudicial error because the successful impeachment of the witness's testimony might have persuaded the trial court to accept Ienco's version of the arrest. The Court of Appeals therefore ordered a new suppression hearing and directed the trial court to determine at that hearing "whether Ienco or the officer is believed." *United States v. Ienco*, 92 F.3d 564, 569 (7th Cir.1996).

Turning its attention to Ienco's trial, the Court of Appeals found that there were two errors in the jury instructions, which combined to constitute prejudicial error. First, the Court of Appeals found that the instruction given to the jury on Ienco's firearm offense, although proper when it was given, was erroneous. *Id.* at 570. Ienco was charged with "using or carrying" a firearm in the commission of a crime, and the jury was instructed that Ienco could be convicted on this charge if the jury merely found that he knowingly possessed the firearm at the time. But in *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), which was decided after Ienco's conviction but before his appeal, the Supreme Court held that the proper jury instruction for this offense would require the jury to find that a defendant actively employed the firearm, at a minimum by brandishing or waving it, rather than merely having it in his possession. *Id.* at 142-50, 116 S.Ct. 501. Thus, the jury instruction given at Ienco's trial was error. *Ienco*, 92 F.3d at 570.

The Court of Appeals also found that the trial judge had committed error when, late in the trial, he reversed his earlier decision and announced that he would give the jury a *Pinkerton* instruction under which Ienco could be held responsible for crimes committed by his co-conspirator Iovine. *Id.* at 569 (citing *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946)). With the judge's prior assurance that the *Pinkerton* instruction would not be given, Ienco's attorney argued that the more serious firearm offenses were committed by Iovine. When the judge later announced that he intended to give a *Pinkerton* instruction after all, that defense strategy became a trap for Ienco since he could now be held responsible for crimes he had tried to prove Iovine had committed.

Ienco had not objected at trial to the erroneous jury instruction, so the standard of review should have been that of plain error. But the government argued on appeal that the error was not prejudicial beyond a reasonable doubt. By so doing, the Court of Appeals found that the government waived the correct and less stringent standard of plain error. Therefore, the Court of Appeals found that the use of this instruction was reversible error. In view of the multiple jury instruction errors, the Court of Appeals remanded the case for a new trial, irrespective of the outcome of the second suppression hearing.

At the second suppression hearing, the district court determined that the officers' version of the arrest was not credible. The court found that the officers had detained Ienco and Iovine in the squad car before there was probable cause to effect an arrest.[3] As such, the arrest was illegal and all of

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[3] Because the officers retained both men's personal effects, and the squad car's rear-seat doors and windows could not be opened from the inside, the court determined that Ienco and Iovine's detention in the back of the car while the officers investigated the complaint amounted to an

the evidence found as a result of that arrest, including the firearms in the rental car and the explosives in the hotel room, was inadmissible. *United States v. Ienco*, No. 94 CR 586, 1998 WL 249233, at *8 (N.D.Ill. May 11, 1998). Therefore, Ienco's motion to suppress the evidence was granted.[4] *Id.*

The government subsequently withdrew its indictments against Ienco. Ienco then brought these claims of malicious prosecution against Angarone, McGann, and the City of Chicago. Defendants Angarone and McGann have filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56 for failure to state a valid claim for relief under 42 U.S.C. § 1983.

## LEGAL STANDARDS

Summary judgment is proper when the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 150 (7th Cir.1994). In determining whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to,

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arrest. *United States v. Ienco*, No. 94 CR 586-1, 1997 WL 392188, at *3 (N.D.Ill. July 3, 1997).

[4] The procedural history is somewhat more complicated than this summary implies. On remand, the district court partially granted Ienco's motion to suppress but retained jurisdiction over the remainder. The government appealed. Ienco moved to dismiss on the basis that the government lacked jurisdiction to appeal, since his motion was in part still before the district court. The Court of Appeals instructed the district court to grant the motion to suppress in its entirety, in order to bring all appealable issues to ripeness at the same time. This the district court did, and the government appealed the full grant of the motion to dismiss. The Court of Appeals affirmed the district court's grant of Ienco's motion to suppress, holding that the arrest was premature and the physical evidence and co-defendant Iovine's custodial statements and trial testimony must be suppressed. *Ienco*, 1998 WL 249233.

and draw all reasonable inferences in favor of, the non-moving party. *Pafford v. Herman*, 148 F.3d 658, 665 (7th Cir.1998).

## ANALYSIS

Ienco brings this action under 42 U.S.C. § 1983 against the City of Chicago and against Police Officers Angarone and McGann, both individually and in their official capacities as members of the Chicago Police Department. A suit against a government officer in his official capacity is actually a suit against the government entity for which the officer works. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). As such, Ienco's claims against the City of Chicago are redundant to those against the police officers in their official capacity.[5]

Section 1983 provides that any person who, under color of law, causes the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. An action against a municipality is one against a "person" for purposes of § 1983. *Monell*, 436 U.S. at 689, 98 S.Ct. 2018. To bring a § 1983 action against a municipality, a plaintiff must allege three things: (1) that he suffered a deprivation of a constitutional right; (2) as a result of either an official policy or custom; (3) which was the proximate cause of his injury. *Johnson v. City of Chicago*, 711 F.Supp. 1465, 1467 (N.D.Ill.1989). It is unnecessary for this Court to reach the analysis of either "official policy or custom," or that of proximate cause, however, because Ienco has failed to establish any valid claim that he was subjected to the constitutional injury he alleges, *i.e.* malicious prosecution.

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[5] In fact, the Court stayed the proceedings against the City of Chicago pending resolution of this motion.

A. Ienco's Claim Fails to State a Valid Cause of Action for Malicious Prosecution

The federal and state causes of action are linked. To bring a § 1983 action for malicious prosecution, a plaintiff must allege that he has satisfied the requirements of a state law cause of action for malicious prosecution. *Cervantes v. Jones*, 188 F.3d 805, 809 (7th Cir.1999). As explained below, the Illinois state law cause of action for malicious prosecution has five required elements. *See Washington v. Summerville*, 127 F.3d 552 at 557 (7th Cir.1997) (citations omitted). To prevail on the state law claim, a plaintiff must prove every one of these elements. *Id.* (citing *Swick v. Liautaud*, 169 Ill.2d 504, 215 Ill.Dec. 98, 662 N.E.2d 1238, 1242 (1996) (additional citations omitted)).

Ienco's claims for malicious prosecution fail as a matter of law for two distinct reasons, either of which would be sufficient to grant full summary judgment in favor of Defendants. Ienco fails to satisfy at least two of the five required elements of the Illinois state law cause of action, and because the federal cause of action requires that he satisfy all elements of the state claim, Ienco's federal claim fails as well.

To state a claim for malicious prosecution under Illinois law, a plaintiff must allege that: (1) the defendant commenced or continued an original criminal or civil proceeding; (2) the proceeding terminated in the plaintiff's favor; (3) the proceeding was without probable cause; (4) the defendant acted maliciously in initiating or continuing the proceeding; and (5) the plaintiff was injured. *Washington*, 127 F.3d at 557 (citations omitted). All of these elements must be proven or the claim fails. *Id.* (citing *Swick*, 215 Ill.Dec. 98, 662 N.E.2d at 1242 (additional citations omitted)).

For the purposes of a motion for summary judgment, Ienco's incarceration subsequent to his conviction on criminal charges arguably meets the requirement of a legal injury

specified in the fifth element of the cause of action. Ienco's claim, however, fails to meet at least two of the four other required elements.[6]

1. The Proceedings Did Not Terminate in Plaintiff's Favor

In order to satisfy the second element of the state law malicious prosecution cause of action, a plaintiff has the burden of proving that the underlying criminal proceeding terminated in a manner indicative of his innocence. *See Washington*, 127 F.3d 552. Thus, a plaintiff claiming malicious prosecution must be innocent of the crime charged in the underlying prosecution. *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir.2000). *See also* Prosser and Keeton on the Law of Torts 885 (5th ed.1984) (citing Restatement of Torts § 657) ("[I]t is always open to the defendant to escape liability by showing in the malicious prosecution suit itself that the plaintiff was in fact guilty of the offense with which he was charged."). A favorable termination, for purposes of a malicious prosecution claim, must be one that deals with the factual issues of a case. *Cult Awareness Network v. Church of Scientology Int'l*, 177 Ill.2d 267, 226 Ill.Dec. 604, 685 N.E.2d 1347, 1350 (1997) (citations omitted).

In this case, the factual issues are whether Ienco did, in fact, illegally transport firearms and explosives to Chicago, attempt extortion, and carry or use those firearms in the attempt. The termination of this case did not ultimately deal with these issues. Although Ienco was convicted of the criminal charges against him, the conviction was vacated as a result of technical errors by the trial judge, and the matter was

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[6] The first element, whether Defendants commenced or continued criminal proceedings, and the fourth element, malicious intent, are mixed questions of fact and law, which this Court finds unnecessary to consider because Ienco's claim fails to establish two other required elements of the state law cause of action.

remanded for a new suppression hearing and a new trial. *Ienco*, 92 F.3d at 569-70. Ienco's motion to suppress the evidence against him was subsequently granted because the court found that the evidence was discovered as the result of an arrest made before probable cause was established, *Ienco*, 1997 WL 392188, at *6, and the government withdrew its indictments.

A conviction based on reliable evidence that is later suppressed under the Fourth Amendment does not prove innocence of the crime charged. *Gonzalez v. Entress*, 133 F.3d 551, 555 (7th Cir.1998). The criminal proceedings against Ienco were terminated by withdrawal of the indictment against him, subsequent to his successful motion to suppress the evidence found after his arrest. This is neither a finding indicative of innocence nor one that deals with the factual issues of the case. It does not qualify as a favorable termination of his criminal proceedings, and Ienco's claim therefore fails the second prong of the state law cause of action.

2. There Was Probable Cause for the Criminal Proceedings

Assuming, *arguendo*, that Ienco could satisfy the other elements of the state law cause of action for malicious prosecution, he must still show that the proceedings against him were initiated or continued without probable cause. Ienco also fails to demonstrate this element as well.

A grand jury indicted Ienco on five counts of violating federal law. Under Illinois law, a grand jury indictment is prima facie evidence of probable cause. *Bontkowski v. United States*, 28 F.3d 36, 37 (7th Cir.1994). Ienco, citing *Tribblet v. Sanchez*, No. 95 C 6816, 1997 WL 106303, at *3 (N.D.Ill. Feb.12, 1997), maintains that the "officers cannot claim they had probable cause if the evidence upon which probable cause was based was obtained in an unconstitutional

manner." (R. 21, Pl.'s Mem. Opp'n to Defs. Angarone and McGann's Mot. Summ. J. at 14.) *Tribblet* is inapplicable here: Ienco confuses probable cause for arrest with probable cause for prosecution. In *Tribblet*, the arresting officers attempted to use evidence they seized in an illegal search to show they had probable cause to conduct that search in the first place. The *Tribblet* Court properly rejected this post-hoc rationale and held that the search was unconstitutional. *Tribblet*, 1997 WL 106303, at *3. The Illinois state law cause of action for malicious prosecution, however, refers not to a lack of probable cause for the arrest but to a lack of probable cause for the prosecution.

In this case, at the time the decision to prosecute Ienco was made, the authorities had evidence that Ienco and Iovine had illegally transported two firearms, ammunition, and explosives from New York to Chicago, with the apparent intent of using them to collect an alleged business debt. Moreover, a state law criminal complaint had been filed, followed by a federal complaint, and the men had been indicted by federal grand jury. There was more than adequate probable cause to bring criminal proceedings against Ienco and Iovine. That the Court of Appeals later determined that Angarone and McGann did not have probable cause to arrest Ienco and Iovine when they did does not operate retroactively to negate the fact that probable cause existed to initiate criminal proceedings against them. Ienco fails to show that the proceedings against him were brought without probable cause.

B. Claims Against the City of Chicago are Dismissed

Ienco's claims against the City of Chicago depend entirely on finding Defendant officers, in their official capacities, liable under § 1983. *See Monell*, 436 U.S. 658, 98 S.Ct. 2018. Because this Court finds that all of Ienco's claims against the officers are without merit, Ienco's claims against the City of Chicago are dismissed.

## CONCLUSION

For the foregoing reasons, Angarone and McGann's motion for summary judgment, (R. 18-1), is granted as to all of Ienco's claims against them, both personally and in their official capacities. Furthermore, Ienco's claims against the City of Chicago are dismissed. The Clerk of the Court is directed to enter final judgment, pursuant to Fed.R.Civ.P. 58, against Ienco and in favor of the defendants.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

[Filed June 20, 2002]

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No. 01-2395

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JOSEPH IENCO,
*Plaintiff-Appellant,*

v.

CITY OF CHICAGO, a municipal corporation, P.O. KENNETH ANGARONE, individually and in his official capacity as a member of the Chicago Police Department, and P.O. THOMAS MCGANN, individually and in his official capacity as a member of the Chicago Police Department,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northen District of Illinois, Eastern Division
No. 00-C-3831
Ruben Castillo, *Judge.*

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Before Hon. John L. Coffey, Hon. Daniel A. Manion, and Hon, Ann Claire Williams, *Circuit Judges.*

ORDER

On consideration of the petition for rehearing filed by counsel for Defendants-Appellees Kenneth Angarone and Thomas McGann on April 25, 2002, all members of the original panel have voted to DENY the petition for rehearing. No member of this court has requested a vote on the petition to rehear this case en banc.

Accordingly, the petition for rehearing is DENIED.

Supreme Court, U.S.
FILED
OCT 15 '02
OFFICE OF THE CLERK

No. 02-223

In The

# Supreme Court of the United States

KENNETH ANGARONE AND THOMAS MCGANN,

*Petitioners,*

v.

JOSEPH IENCO,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the doctrine of testimonial immunity shields police officers from liability under 28 U.S.C. § 1983 for falsification of police reports, withholding of exculpatory evidence, and lying to the FBI and prosecutors prior to a criminal defendant's trial.

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## STATEMENT OF THE CASE

### A.

Neither *Briscoe v. LaHue*, 460 U.S. 325 (1983), the other precedents of this Court, nor those of any other Circuit support the City of Chicago's unprincipled, attempted expansion of the doctrine of absolute testimonial immunity to pre-testimonial conduct that admittedly violates the constitutional rights of a criminal defendant. Focusing exclusively on the police officers' perjury in this case, the Petition ignores the pervasive and willful extrajudicial police misconduct that occurred prior to the officers' testimony, including their preparation of false police reports, their intentional lies to the FBI and to federal prosecutors, and their deliberate withholding of a critical report and other exculpatory information from the prosecutors and the FBI.

The City's blanket argument that "eight other circuits have rejected the Seventh Circuit's view that a witness's immunity cannot shield pretrial conduct" (Petition at 5) is palpably wrong. The Circuit Courts of Appeals are in perfect unanimity that pre-testimonial misconduct by law enforcement officials does not become retroactively immunized by the expedient of testifying. In short, the "serious disagreement" among the Circuits, posited by the Petition, is non-existent. Moreover, the cases cited by the City do not support the proposition that testimonial immunity extends to misconduct beyond perjurious testimony. Rather, they stand for the proposition that a *conspiracy to commit perjury*, like the perjury itself, is immunized, based on the principle that a person may not be prosecuted for conspiracy to commit an act that he may perform with impunity. As the Seventh Circuit recognized, however, this

case is neither about perjury nor a conspiracy to commit perjury.

Acceptance of the City's arguments would result in an insidious and infinite expansion of the doctrine of absolute immunity by retroactively immunizing all extra-judicial police misconduct, so long as ultimately there is testimony at a hearing or trial that relates to the matters falsified by the police or the exculpatory information withheld by the police. It would thus mean an end to liability for any kind of extra-judicial police misconduct like that involved in this case – conduct that has been unanimously condemned by every court that has considered such behavior.

An additional danger inherent in the City's argument is that it would encourage police lawlessness and police perjury: As things now stand, a police officer who fabricates evidence or withholds exculpatory evidence is liable under § 1983. Under the City's extraordinarily irresponsible theory, that liability would be extinguished by the simple expedient of actually giving perjured testimony, and when faced with a § 1983 suit, the officer need only argue that his extra-judicial misconduct was a component of a perjury conspiracy and is thus immunized along with the perjury, itself. It is difficult to imagine a more socially deleterious policy or one more at odds with the Court's primary concern of protecting the judicial process. *Briscoe*, 460 U.S. at 334.

**B.**

On August 29, 1994, Joseph Ienco and Gregory Iovine visited Jerome Greenberg at his office in Chicago to discuss a debt Greenberg owed to an associate of Mr. Ienco. The visit became contentious, and Greenberg's

secretary called the police. Mr. Ienco and Iovine left, but returned to Greenberg's office that afternoon to speak with him about the debt. Greenberg observed them on a security camera and called the police. Petitioners, Angarone and McGann of the Chicago Police Department, responded to the following dispatch: "disturbance with two men in a lobby, 2728 North Hamden Court. 2728 Hamden Court. Greenberg is your complainant. You'll find him on the second floor in Apartment 207." As Angarone and McGann arrived at the building, Mr. Ienco and Iovine were leaving. The officers immediately arrested them and forced them into the back seat of the police car, which Ienco and Iovine were unable to leave because the car's doors were locked. After Mr. Iovine and Mr. Ienco were taken to the police station and charged with trespass, the officers found a minivan key in the back seat of their squad car. They returned to Greenberg's office and ultimately found a minivan, which they searched, and discovered a box containing weapons. Mr. Ienco and Mr. Iovine were detained while federal officials were notified.

Officers Angarone and McGann falsified their police reports, claiming that Ienco and Iovine were not arrested and that the encounter had been volitional and friendly. Special Agent Stephen Holland of the FBI was advised by Angarone "as to the facts and circumstances surrounding the arrest of Joseph P. Ienco" and that "as a result of the information provided by the officer," he believed that there existed sufficient evidence to charge Mr. Ienco with various federal crimes. In fact, Angarone, consistent with the falsified police reports, told the Agent that the encounter was friendly, that Iovine and Ienco agreed voluntarily to wait in the car while the police spoke to Greenberg, and that no arrest occurred until much later. Based on the

false information provided by the officers and the seized materials, Mr. Ienco and Mr. Iovine ultimately were charged with having conspired to commit extortion, 18 U.S.C. § 1951, interstate travel in aid of racketeering activity, 18 U.S.C. § 1952, and of having used or carried a firearm during and in relation to a crime of violence. 18 U.S.C. § 924(c)(1).

Mr. Iovine and Mr. Ienco moved to suppress the physical evidence uncovered during the search of the minivan and of their hotel room, claiming that they had been unlawfully arrested and that weapons should be suppressed as fruits of an unconstitutional search and seizure. At the suppression hearing, Angarone claimed he merely asked Iovine and Ienco "whether they would mind remaining while he tried to find out who had called the police. They agreed and he directed them to sit in the back of the police car. They did so, and he shut the door, locking them in. . . . " *United States v. Ienco*, 92 F.3d 564, 566-67 (7th Cir. 1996) ("*Ienco I*").

"Ienco's version of the arrest was different. He testified at the suppression hearing that he and Iovine had been seized by the police the moment they emerged from the building. . . . " *Id.* at 567. At the conclusion of the suppression hearing, the district court denied the motions to suppress based on its belief that Angarone's testimony was "direct, unfeigned, complete, consistent, informed, careful, [and] professional." *Ienco v. City of Chicago*, 286 F.3d 994, 996 (7th Cir. 2002) ("*Ienco III*"). After the unsuccessful suppression motion, Mr. Iovine became a government witness against Mr. Ienco, who was convicted on all charges. Angarone testified at the trial and repeated his perjurious story. The district court sentenced Mr. Ienco to 33 years and five months in jail.

The Court of Appeals for the Seventh Circuit reversed. *Ienco I*, 92 F.3d 564 (7th Cir. 1996). Speaking for a unanimous panel, Chief Judge Posner expressed substantial doubt about the truthfulness of Angarone's story, and concluded that if Ienco were believed, the search "was illegal because according to him the police arrested him before they had spoken to him or Iovine or to Greenberg, and thus before they had probable cause to think that Ienco and Iovine had attempted an illegal entry." *Ienco I*, 92 F.3d at 566. The court held that reversal was required since Mr. Ienco had not been given a fair opportunity to present evidence that supported his rendition of what occurred prior to his being locked in the back seat of the squad car. *Id.* at 565. The court also ordered a new suppression hearing before a new judge and held that if Mr. Ienco prevailed, he would be entitled to a new trial on all counts; if he lost, he would be entitled to a new trial on the gun charge. *Id.* at 569.[1]

In the subsequent suppression hearing before another district judge, Angarone again insisted that Mr. Ienco and Mr. Iovine had voluntarily agreed to stay on the scene in the police car and that they did not seize any identification until almost an hour later when they were taken to the police station. McGann supported this tale. The district court, like Chief Judge Posner, found that it strained

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[1] Reversal was also necessitated by the district court's having given a pre-*Bailey v. United States*, 516 U.S. 137 (1995) jury instruction on the gun possession charges. While the instruction was the law of the circuit at the time of trial, *Bailey* held that it impermissibly allowed for conviction of the charged offense even if the defendants had not "active[ly] employ[ed]" the gun during the alleged offense. *Id.*

credulity rather far to accept this testimony, and thus he concluded:

> According to the two police officers, the two 'suspects' willingly agreed to enter the car. The court finds that the testimony that Ienco and Iovine consented to enter and remain in the police car is not believable. . . . It is improbable that Ienco and Iovine consented to be confined in such a close area for the half-hour or so during which Angarone conducted his investigation. *United States v. Ienco*, 94 CR 586-1, 1997 WL 392188 *7, n.5 (N.D. Ill. July 3, 1997).

Angarone again testified that Mr. Ienco and Mr. Iovine denied having any identification – statements which Angarone claimed he knew to be false and which he claimed aroused his suspicions. Again McGann supported Angarone's story, and the officers' police report prepared the night of the arrest contained the same false claim. Irrefragable evidence in the form of police department computer printouts demonstrated the falsity of the officers' claim. As the district court explained:

> According to Angarone and McGann, Ienco and Iovine told them that they had no identification. The police officers said that although Angarone felt the wallets when he conducted the pat down, he did not have any personal identification about Ienco and Iovine until he asked them for their names, dates of birth, social security numbers, etc. as they were driving back to the police station some thirty-five (35) minutes after they first received the radio dispatch. That would be approximately 6:10 p.m. This testimony is directly contradicted by the NCIC/LEADS printout which shows that at 5:30 p.m. on August 29, 1994, an inquiry was received concerning one Joseph P.

> Ienco from a mobile unit of the Chicago Police Department. At 5:33 p.m. a similar inquiry was received concerning Gregory Iovine. The inquiries concerned the names, social security numbers and dates of birth of Ienco and Iovine. More importantly, Ienco's date of birth was given as October 15, 1993. This was obviously a mistake. Ienco was born on October 17, 1964 but October 15, 1993 happens to be the date of issuance of his driver's license, as set forth on the license itself. As between Ienco making an obvious mistake about his birthday and one of the police officers misreading (and then misreporting) information from the license itself, the latter is the more likely sequence of events. The time of the inquiry also confirms Ienco's recitation of events. The first inquiry was made five minutes after the dispatch was received, not the thirty-five or more attested to by the police officers. This is more than a mere misrecollection since both officers testified to the same highly improbable and significant facts. In short, Angarone and McGann lied. *Id.* at *7, n.7.

The district court ultimately suppressed all the tangible fruits of the seizure and of a subsequent search of their hotel room as well as Mr. Iovine's testimony. *United States v. Ienco*, 94 CR 586, 1998 WL 249233 (N.D. Ill. May 11, 1998). The Seventh Circuit affirmed. *United States v. Ienco*, 182 F.3d 517 (7th Cir. 1999) ("*Ienco II*"). Following the denial of a request for rehearing, the government dismissed the indictment against Mr. Ienco.

Angarone and McGann engaged in substantial pretrial misconduct and withheld exculpatory information about the testimony of other witnesses: Angarone withheld information that McGann was lying to the F.B.I. and

federal prosecutors; McGann withheld information that Angarone was lying to them and to the district court in the suppression hearings and at the trial; McGann and Angarone each withheld information that Mr. Iovine and Mr. Ienco were telling the truth; and the officers withheld information that Mr. Berman lied about the allegedly innocuous nature of the initial encounter between Mr. Ienco and the defendants – testimony which the district court discredited and which tracked Angarone's testimony.[2] As a consequence of the falsification of pre-trial evidence and withholding of exculpatory evidence, "the doom of mere sterility was on the [investigation] from the beginning." *Clark v. United States*, 289 U.S. 1, 11 (1933) (Cardozo, J.).

On June 23, 2001, after serving more than five years in jail, Mr. Ienco commenced the instant action against Angarone, McGann, and the City of Chicago. The complaint charged that the defendants committed the constitutional tort of malicious prosecution under 42 U.S.C. § 1983 (Count I) and the Illinois tort of malicious prosecution (Count II). The complaint and accompanying exhibits described the defendant police officers' initial constitutional violations and their subsequent lies and falsifications to federal officials.

On October 20, 2000, the City moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). On October 31, 2000, the defendant police officers answered the

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[2] Thus, this is not, as the Petition contends, merely a case where the withheld information is based on the witness, himself providing false testimony.

complaint. The officers continued to insist they had done nothing wrong, although finally, in this Court there is at least the acknowledgment that their conduct was "reprehensible." (Petition at 12) On December 19, 2000, the City's motion was denied. Also on this date, Angarone and McGann filed their motion for summary judgment. On May 2, 2001, the district court granted the individual defendants' motion for summary judgment and dismissed Mr. Ienco's claims against the City, which the court concluded automatically fell in light of the dismissal of the claims against the officers. *Ienco v. City of Chicago*, 148 F.Supp.2d 938 (N.D. Ill. 2001).

On April 12, 2002, the Seventh Circuit reversed summary judgment as to Officers Angarone and McGann, *Ienco v. City of Chicago*, 286 F.3d 994 (7th Cir. 2002) ("*Ienco III*"), based on the court's intervening decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001). A petition for rehearing en banc was denied on June 20, 2002, as was a request to stay the mandate. Thereafter, the City timely filed the instant Petition on behalf of the Officers.

## REASONS FOR DENYING THE WRIT

### I.

### Federal Courts Are in Agreement That Testimonial Immunity Does Not Extend To Extra-Judicial Conduct That Deprives A Criminal Defendant of His Constitutional Rights

This Court has interpreted § 1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process." *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (emphasis in original). Thus,

state judges are absolutely immune from liability for their judicial acts, *Pierson v. Ray*, 386 U.S. 547 (1967), and a prosecutor "who acted within the scope of his duties in initiating and pursuing a criminal prosecution" is not amenable to suit under § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976). Likewise, absolute immunity extends to "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Witnesses also enjoy absolute immunity from civil liability for their testimony provided in judicial proceedings. *Briscoe v. LaHue*, 460 U.S. 325 (1983).

The rationale behind granting absolute immunity to judges, prosecutors, and witnesses in connection with the performance of functions "intimately associated" with the judicial process "is based on the policy of protecting the judicial process [itself]." *Id.* at 334 (citing *Imbler*, 424 U.S. at 439, White, J., concurring):

> The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge. *Id.*

Thus, absolute immunity is intended to protect judges and prosecutors from the threat of harassing litigation and to encourage witnesses with pertinent information to avoid self-censorship and testify openly and honestly without the fear of subsequent liability. *Kalina v. Fletcher*, 522 U.S. 118, 124-29 (1997). Therefore, in defining the

contours of absolute immunity, the central focus of this Court has been "the nature of the judicial proceeding itself." *Briscoe*, 460 U.S. at 334.

At the same time, this Court has been "quite sparing in its recognition of absolute immunity, and has refused to extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. 478, 487 (1991). As a result, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* Thus, a prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state. *Buckley*, 509 U.S. at 269-70. Prosecutors similarly do not enjoy absolute immunity for giving certain legal advice to police officers during an investigation, *Burns*, 500 U.S. at 496, for allegedly fabricating evidence concerning an unsolved crime, *Buckley*, 509 U.S. at 276-78, or for knowingly making false statements of fact in an affidavit supporting an application for an arrest warrant. *Kalina v. Fletcher*, 522 U.S. 118 (1997). Likewise, police officers do not enjoy absolute immunity for submitting false affidavits in their applications for arrest warrants. *Malley*, 475 U.S. 342-43. Therefore, in determining questions of immunity, courts must look "to the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269; *Kalina*, 522 U.S. at 127. Moreover, "officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue." *Hafer v. Melo*, 502 U.S. 21 (1991).

In *Malley*, this Court rejected a police officer's arguments that he was entitled to absolute immunity for causing the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and affidavit in

support of an arrest warrant which failed to establish probable cause. The Court held that the police officer's "function" in the case was similar to that of a complaining witness, which was not entitled to absolute immunity at common law, and, further, that the police officer's submitting an affidavit seeking an arrest warrant, "though a vital part of the administration of criminal justice," was too far removed from the *judicial* phase of criminal proceedings to be entitled to absolute immunity. 475 U.S. at 342-43. (Emphasis supplied).

Similarly, this Court in *Kalina* held that a prosecutor's conduct in making false statements in an affidavit offered in support of a request for an arrest warrant was analogous to a police officer or other competent witness in swearing to facts to support a finding of probable cause, and therefore, he was not entitled to absolute immunity. 522 U.S at 129-30. *Cf. Kulwicki v. Dawson*, 969 F.2d 1454 (3rd Cir. 1992) (Prosecutor accused of manufacturing false evidence after he had stopped working on case not entitled to immunity because conduct fell outside his quasi-judicial function as prosecutor.) Even in *Briscoe*, this Court recognized that the doctrine of absolute immunity is not without limits, and expressly left open the issue of whether immunity extends to a police officer's false testimony at a probable cause hearing. 460 U.S. at 328 n.5. *Cf. Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984) ("The witness immunity discussed in *Briscoe* is afforded to encourage complete disclosure in judicial proceedings as a means for ascertaining the truth, and, because of its common law roots, is necessarily limited to witnesses in judge-supervised trials.")

Here, the Seventh Circuit held that the doctrine of absolute testimonial immunity did not bar Mr. Ienco's

claims that Officers Angarone and McGann withheld exculpatory information and lied to the federal prosecutors who indicted him. *Ienco v. City of Chicago*, 286 F.3d 994 (7th Cir. 2002). In the court's view, "[n]either the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity." *Id.* Contrary to the City's mischaracterization, the Seventh Circuit's decision explicitly recognized that perjured testimony *is* immunized, and that "[i]f Ienco were merely claiming damages based on the officers' perjured testimony, the officers would be entitled to absolute immunity." *Ienco III*, 286 F.3d at 1000.

Ienco's claims, however, "are not based on the officers' perjured testimony." Rather, as the court emphasized, they are based on the police officers' false reports, lies to federal officials, and withholding of exculpatory evidence. *Id.* This conduct has never enjoyed absolute immunity under § 1983, and extending the doctrine of testimonial immunity to such conduct would only embolden police officers to disregard the constitution, knowing that any liability for their conduct would be immunized by the simple expedient of testifying in a judicial proceeding. This would encourage rather than deter illegal conduct.

The City's blanket argument that "eight other circuits have rejected the Seventh Circuit's view that a witness's immunity cannot shield pretrial conduct" (Petition at 5) is wrong. First, the Seventh Circuit expressly held that the Petitioners would be entitled to absolute immunity if Ienco's claims were based solely on their pre-trial perjury. *Id.* Second, other circuits share the Seventh Circuit's view that police officers do not enjoy absolute testimonial immunity for pre-trial conduct, and that such conduct is

not retroactively immunized by subsequent perjurious testimony.

For example, in *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), the Sixth Circuit held that although a deputy sheriff was absolutely immune from suit for his testimony during the plaintiff's criminal trial, he was not entitled to absolute testimonial immunity for his alleged non-testimonial conduct that ultimately led to witness testimony, including fabricating probable cause, manufacturing false evidence, and coercing a witness. In rejecting the very argument that the City raises in the Petition – that the defendant should be entitled to absolute immunity because the alleged manufacturing of false evidence and later presenting that evidence in the form of testimony are "inextricably linked" – the court of appeals held that such reasoning would allow police officers who fabricate evidence or manufacture probable cause to shield themselves from liability simply by later providing false testimony regarding that evidence:

> The doctrine of absolute immunity for testimony is a shield to ensure that those individuals intimately involved in the judicial process are able to carry out their responsibilities without the constant threat of vexatious lawsuits, not a sword allowing them to trample the statutory and constitutional rights of others. *Id.* at 1003-04.

Similarly, in *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984), *modified on other grounds*, 744 F.2d 1131, the Fifth Circuit held that a state investigator, who knowingly gave false testimony at a probable cause hearing, was not entitled to absolute immunity:

> If, then, the Fourteenth Amendment imposes a duty on state prosecutors to charge only upon

> ascertaining probable cause, it follows that one acting under color of state authority, as [the defendant] was alleged to have been, can be liable for subverting the performance of that duty, as by maliciously tendering false information to the prosecutor which leads him to believe probable cause exists where there is none. *Id.* at 260.

The court further held that the plaintiffs had been deprived of their right to a determination of probable cause before arrest or detention because "the information which formed the basis of their arrest and detention was supplied by the [defendant] with the knowledge it was false." *Id.*

The court rejected the defendant's argument that he was entitled to absolute immunity under *Briscoe* because the plaintiffs' claims were premised on his testimony at the probable cause hearing: "*Briscoe* does not create immunity where none existed before; it merely rejects the notion that § 1983 abolishes for police officers that testimonial immunity which exists at common law." *Id.* at 261. Thus, the court held that *Briscoe* did not afford immunity from suit for knowingly false testimony submitted at probable cause determinations. *Id. Accord, Mastroianni v. Bowers*, 160 F.3d 671, 678 (11th Cir. 1998), *vacated on other grounds*, 173 F.3d 1363 (11th Cir. 1999) (Although police officer was entitled to absolute immunity for grand jury testimony, "that immunity cannot extend backwards to protect him from his alleged involvement in conspiring to violate [plaintiff's] constitutional rights."); *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992) (Summary judgment properly denied where disputed questions remained regarding police investigator's role in actively instigating, encouraging, and/or perpetuating Plaintiffs'

prosecution, and other events prior to his grand jury testimony. Sufficient evidence exists that defendant's actions, including his grand jury testimony, were taken in retaliation for plaintiffs exercising their constitutionally protected freedoms).

Moreover, several courts addressing the issue left unresolved in *Briscoe* have held that the doctrine of testimonial immunity does *not* extend to *testimony* in pre-trial proceedings, including grand jury and probable cause hearings, if the defendant was a "complaining witness," who played a role in initiating the prosecution. For example, in *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988), the Second Circuit, relying on *Malley,* held that a police officer who intentionally gave false testimony before a grand jury which led to the initiation of a baseless prosecution was not entitled to absolute immunity from civil liability under § 1983. After discussing the common law distinction between lay witnesses, who generally enjoyed absolute immunity for their testimony if relevant to a judicial proceeding, and a complaining witness, who did not enjoy such absolute immunity, the court noted that the doctrine of absolute immunity applied only where liability is asserted solely because of a police officer's false *testimony* at a judicial proceeding. *Id.* at 960-61 (citing cases). Thus, the court held that the defendant police officers could not use their grand jury testimony as a shield for their illegal pre-testimonial conduct:

> Where, however, the constitutional tort is the action of the police officer in initiating a baseless prosecution, his role as a "complaining witness" renders him liable to the victim under section 1983, just as it did at common law, and the fact that his testimony at a judicial proceeding may

> have been the means by which he initiated the prosecution does not permit him to transpose the immunity available for defamation as a defense to malicious prosecution. *Id.* at 961.

The court further rejected the police officers' argument that the role of both the public prosecutor and the grand jury in advancing the prosecution of the plaintiff necessarily insulated them from liability for malicious prosecution.

> The intervening acts of a grand jury have never been enough to defeat an otherwise viable malicious prosecution claim. . . . And though an indictment by a grand jury is generally considered prima facie evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence.

*Id.* at 961-62. Nor did the prosecutor's role affect the court's immunity analysis. "As with the grand jury, however, the public prosecutor's role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness's testimony is knowingly and maliciously false." *Id.* at 962.

In *Anthony v. Baker*, 767 F.2d 657 (10th Cir. 1985), the Tenth Circuit held that state and federal law enforcement officers could be liable under § 1983 "when they conspire to procure groundless state indictments and charges based upon fabricated evidence or false, distorted, perjurious testimony presented to official bodies in order to maliciously bring about a citizen's trial or conviction." *Id.* at 662. The court of appeals agreed with the district court that the complaint could not be dismissed under the testimonial immunity doctrine "because it alleged other

facts which fell outside the scope of immunity defined [in *Briscoe*]," and held that *Briscoe* did not afford absolute immunity for the testimony of the defendants before the grand jury. *Id.* at 663.[3]

*Not a single case cited by the City addresses the applicability of testimonial immunity to misconduct by a police officer followed by the officer's testimony in a trial or adversarial pre-trial proceeding.* Rather, the City's authorities stand for the unremarkable proposition that the doctrine of testimonial immunity bars § 1983 suits against parties testifying in quasi-judicial capacities,[4] and that a *conspiracy to commit perjury*, like the perjury itself, is immunized, on the principle that a person may not be

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[3] In a subsequent decision, *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) (*Anthony v. Baker II*), the Court held that its earlier decision decided only that the district court erred in granting the defendant absolute immunity for his entire grand jury testimony. The court concluded that the defendant should be denied absolute immunity for his testimony at the grand jury and a preliminary hearing if he is found to be a complaining witness whose testimony was relevant to the manner in which he initiated or perpetuated the prosecution of the plaintiff. *Id.* at 1401. Thus, the Tenth Circuit not only distinguished between a defendant's pre-testimonial conduct and his testimony before a grand jury. It also distinguished between whether the defendant testified before the grand jury as a lay witness or a complaining witness.

[4] *Moses v. Parwatikar*, 813 F.2d 891 (8th Cir. 1987) (Allegation of conspiracy will not abrogate absolute immunity afforded court-appointed psychiatrist in performance of quasi-judicial functions, which consisted of examining defendant's competency and reporting findings to the court); *Watterson v. Page*, 987 F.2d 1 (1st Cir.) (Court-appointed psychologist involved in state's child abuse investigation entitled to absolute immunity for testimony in the course of judicial proceedings).

prosecuted for conspiracy to commit an act that he may perform with impunity.[5]

Thus, the City sedulously seeks to blur the important analytical distinction between police perjury, which is not actionable, and the falsification of reports and withholding of exculpatory information, which most assuredly are subject to liability under § 1983. The Petition's implicit invocation of the general principle that all acts performed as part of an alleged *conspiracy to commit perjury* are entitled to absolute immunity is thus invocation of a principle not relevant to this case. Neither *Briscoe* nor any other decision of this Court pretends to hold that merely because police officers ultimately perjure themselves, every antecedent act of misconduct is retroactively immunized.[6]

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[5] *See e.g., Miller v. Glanz*, 948 F.2d 1562, 1570 (10th Cir. 1991) (Conspiracy to present false testimony at trial), in which the court also noted that the First and Second Circuits have held that the absolute immunity allowed in *Briscoe* should not extend to conspiracies to present false testimony, citing *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.), *cert. denied*, 479 U.S. 828 (1986) and *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246 (2nd Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985); *Hunt v. Bennett*, 17 F.3d 1263 (10th Cir. 1994) (Prosecutorial immunity not waived by allegation of conspiracy to commit perjury with non-immune parties); *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001) (Conspiracy to commit perjury); *Franklin v. Terr*, 201 F.3d 1098 (9th Cir. 2000) (Plaintiff could not circumvent psychiatrist's absolute immunity for testimony given at criminal trial by alleging conspiracy to present false testimony).

[6] Indeed, the City concedes that the officers' underlying search and seizure of Ienco and his effects would be actionable under § 1983 as a violation of the Fourth Amendment, and that the officers would lack testimonial immunity on such a claim, "since the doctrine does not reach nontestimonial conduct." (Petition at 13 n. 9).

In fact, several of the cases cited by the Petition expressly held that testimonial immunity did *not* immunize a defendant's pre-testimonial conduct, even though it was followed by perjurious testimony. For example, in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999) (Petition at 8), the Eleventh Circuit held that a detective was not entitled to either absolute or qualified immunity for his allegedly false sworn statements contained in an arrest affidavit presented at the plaintiff's probable cause hearing. The court held that even though the affidavit was submitted in a judicial proceeding, the detective's "function" and "conduct" were similar to that of the police officer in *Malley*, and the prosecutor in *Kalina*, where this Court held that there was no absolute immunity. *Id.* at 1284-85. As a result, the court concluded that the detective was not entitled to absolute immunity, particularly because his statements "were the sole basis asserted for probable cause in the arrest affidavit." *Id.* at 1285.

The court also rejected the very argument that the Petition seeks to advance here: that pre-testimonial misconduct becomes retroactively immunized by subsequent testimony at a judicial proceeding. In *Jones*, the defendants argued that their alleged investigative misconduct, including a fabricated confession and the planting of a boot print, only became actionable if used as evidence to convict the plaintiff. The detectives argued that because a constitutional violation only occurs if they use the allegedly fabricated evidence by testifying about it to a grand jury or judge, they should be entitled to testimonial immunity for all the pre-indictment conduct at issue. Relying on *Buckley*, in which this Court rejected a similar argument that a prosecutor's later use before a grand jury of evidence produced from the prosecutor's investigative work was entitled to absolute immunity, the court held that the detectives could not "cloak their misconduct

during an investigation in absolute immunity merely by presenting the fabricated evidence or testifying about it in a grand jury hearing or trial." *Id.* at 1290 (citing *Buckley*, 509 U.S. at 275-76). "The focus must be on the nature of the actions performed at the time they are performed." *Id.* *Accord*, *Buckley v. Fitzsimmons*, 20 F.3d 789, 797 (7th Cir. 1994) ("[C]onstitutional wrongs completed out of court are actionable even if they lead to immunized acts. Immunity for prosecutorial deeds does not whitewash wrongs completed during the investigation.")

Similarly, in *McArdle v. Tronetti*, 961 F.2d 1083 (3rd Cir. 1992) (Petition at 8), the Third Circuit held that although a prison counselor and physician were immune from § 1983 liability with respect to claims for false diagnosis, false testimony, and conspiracy, they were not protected by either witness or judicial immunity regarding allegations that they were responsible for filing a petition for involuntary commitment that they knew contained lies. In distinguishing between the defendants' conduct for immunity purposes, the court found that the false diagnosis and testimony claims concerned the defendants' functions as witnesses and officers acting at the court's direction. When the defendant filed the involuntary commitment petition, however, "he was functioning neither as a witness or as an arm of a court; the petition was not the equivalent of testimony offered in court or a written report offered at the court's direction." *Id.* *See also* *Alioto v. City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987) (Petition at 8) (Absolute witness immunity for conspiring to give false testimony before grand jury shields only those witnesses who actually testified in a judicial proceeding; "[the] doctrine does not shield from liability alleged conspiracies to falsify non-testimonial evidence").

Acceptance of the City's arguments would thus result in an insidious and infinite expansion of the doctrine of absolute immunity by retroactively immunizing all extra-judicial police misconduct, so long as ultimately there is testimony at a hearing or trial that relates to the matters falsified by the police or the exculpatory information withheld by the police. Moreover, the City's argument would encourage police lawlessness and police perjury, because a police officer who fabricates evidence or withholds exculpatory evidence could extinguish any liability under § 1983 by the simple expedient of actually giving perjured testimony. It is difficult to imagine a more socially deleterious policy.

## II.

## The Seventh Circuit's Decision Does Not Destroy The Doctrine of Witness Immunity

The Seventh Circuit's holding neither "effectively destroys the doctrine of witness immunity" (Petition at 5), nor "exposes law enforcement officials to the precise burdens of litigation from which this Court decreed they should be spared in *Briscoe*." (Petition at 15). As a threshold matter, the City's claim is belied by the fact that in a number of cases, including several of its own authorities,[7]

[7] *See e.g. McArdle v. Tronetti, supra,* 961 F.2d 1083 (3rd Cir. 1992) (Although prison counselor and physician were immune from § 1983 liability with respect to claims for false diagnosis, false testimony, and conspiracy, they were not entitled to witness or judicial immunity on claims of filing a petition for involuntary commitment which they knew contained lies); *Jones v. Cannon, supra,* 174 F.3d 1271, 1286 (11th Cir. 1999) (Although detective enjoyed absolute immunity for allegedly false testimony before the grand jury, during pre-trial deposition and at the

(Continued on following page)

courts have held simultaneously that while absolute immunity would apply to a defendant's actual testimony, it would not extend to pre-testimonial misconduct. For example, in *Kalina v. Fletcher*, 522 U.S. 118 (1997), this Court held that although a prosecutor's conduct in connection with the preparation and filing of charging documents was entitled to absolute immunity, the prosecutor was not entitled to absolute immunity in connection with making allegedly false statements in an affidavit supporting his application for an arrest warrant.

Similarly, in *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988), the Eleventh Circuit held that although an investigator for the Alabama Attorney General's Office was entitled to absolute immunity from liability under § 1983 for his grand jury testimony, the immunity did not extend to the investigator's "pre-testimonial acts" in furtherance of an alleged conspiracy to cause the plaintiffs' wrongful indictment and prosecution. According to the Court, "any of the pretestimonial acts that might have undermined the federally guaranteed right to be free of malicious prosecution can form the basis of a § 1983 action." *Id.* at 426. *Accord*, *Kulwicki v. Dawson*, 969 F.2d 1454 (3rd Cir. 1992) (District attorney was entitled to absolute prosecutorial immunity for initiating criminal charges against plaintiff, but not entitled to absolute immunity for witness interviews conducted prior to filing charges and communicating with press); *Keko v. Hingle*, 1999 WL 508406 (E.D. La. July 8, 1999) (Expert witness entitled to absolute immunity for actual testimony during court proceedings, but not

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plaintiff's criminal trial, immunity did not extend to false statements contained in an arrest affidavit presented at the plaintiff's probable cause hearing).

for his alleged role in obtaining arrest warrant and malicious prosecution of plaintiff).

Moreover, courts have had no difficulty distinguishing between conduct and testimony that are integral parts of the judicial process, and, therefore, entitled to absolute immunity on the one hand, and extra-judicial conduct or functions on the other, which only entitle the defendant to qualified immunity. For example, in *Malley*, this Court rejected the argument that policy considerations require absolute immunity for a police officer applying for a warrant:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. That is, a police officer will be entitled to qualified immunity unless, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. 475 U.S. at 341.[8]

Similarly, in *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984), the First Circuit extended absolute immunity to a federal prosecutor in connection with his conduct while gathering evidence for the plaintiff's prior criminal prosecution. At the same time, however, the court held

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[8] Here, the Seventh Circuit remanded the case to the district court to determine whether the police enjoyed qualified immunity. On remand, the district court will thus be required to determine whether there was a deliberate withholding of evidence designed to misdirect or mislead the prosecutors or the defense as opposed to a mere failure to take the initiative in providing information to them that would have come out as soon as either the defense or the prosecutors asked the police officers for the information.

that an FBI agent was not entitled to absolute immunity under *Briscoe* for his alleged misrepresentations in an affidavit submitted in support of the warrant for the plaintiff's arrest. According to the court, because the process of swearing out a warrant affidavit lacks any of the procedural safeguards of a judicial proceeding designed to ascertain the truth, "we think it desirable that officers should, in effect, be required to think twice about allegations in warrant affidavits." *Id.* at 31. *Cf. Malley* at 343 ("In the case of an officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity."). The *Krohn* court further held that because police officers, who are less critical to the judicial process than prosecutors, "are not acting in their quasi-judicial capacity when they act as investigators . . . activities such as requesting a warrant [are] not judicial, but administrative, and that absolute immunity does not apply. *Id.* at 31.[9]

While the costs of judgments entered against police officers for misconduct *are* passed along to the taxpaying public (Petition at 16 n. 10), it could not be otherwise, and that is as it should be. All costs incurred by the City in its operations are shifted to the taxpayers. But that is not a reason to immunize police misconduct beyond the narrow boundaries required by the perceived necessity and "balance of harms" that brought the rule of absolute

[9] While the Fifth Circuit has held that *Briscoe* did not afford absolute immunity to police officers who perjured themselves at a pre-trial probable cause hearing, *Wheeler, supra*, the court also ruled that absolute immunity *does* apply to an officer's testimony at an adversarial pre-trial suppression hearing. *Moore v. McDonald*, 30 F.3d 616 (5th Cir. 1994).

immunity into being. Richard Posner, *The Problematics Of Moral And Legal Theory*, 171 (1999). If "liability is the beginning of responsibility," as Dewey taught, City officials faced with the prospect of judgments for police misconduct will act to eliminate the conditions that allow such awards. If they do not, and the costs become sufficiently great, the electorate will take appropriate action. That is the essence of a responsible democracy.[10]

## CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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[10] The Petition's *ipse dixit* that police will be chilled in their efforts is especially unconvincing. All that will be deterred is falsification of reports and withholding of evidence. Section 1983 liability exists precisely to chill such misconduct. *Newsome*, 256 F.3d at 752 ("Requiring culpable officers to pay damages to the victims of their actions holds out promise of both deterring and remediating violations of the Constitution.").

(3)

No. 02-223

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH ANGARONE and THOMAS McGANN,

Petitioners,

v.

JOSEPH P. IENCO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

# BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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# BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## PRELIMINARY STATEMENT

The City of New York ("the City") submits this brief in support of the petition for a writ of certiorari in this matter.

## INTEREST OF THE AMICUS CURIAE

The City has a significant interest in having this Court grant the petition. The City is, of course, the nation's largest municipality. It is also probably the nation's single largest payer of tort judgments and settlements. In fiscal 2001, the City paid $557.3 million in resolution of tort claims. Approximately $15 million of that amount resulted from actions seeking damages under 42 U.S.C. § 1983.

Any increase in the City's tort exposure could have a negative impact on the provision of public services in a time of budgetary stringency.

Plaintiffs regularly bring actions under section 1983 against the City, claiming that City police officers had testified perjuriously in a prior criminal trial. Plaintiffs typically plead a cause of action against the City based on a theory of municipal policy or practice.

Even without a cause of action directly against the City, the public fisc is still at risk in actions of this nature. Under New York General Municipal Law § 50-k(2), the City will provide for the defense of an employee in a civil action if the Corporation Counsel finds that the alleged act or omission "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." Furthermore, pursuant to New York General Municipal Law § 50-k(3), the City "shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller" where the employee acted within the scope of duty and not in violation of any rule or regulation. The City will thus indemnify an employee for a judgment when the Corporation Counsel determines that the employee acted within his or her scope of duty, although not for intentional or reckless wrongdoing. Such tort exposure burdens the City's ability to provide basic services.

Additionally, as a major municipality, the City stands virtually alone with the City of Chicago. The Court of Appeals for the Second Circuit is the only other circuit that has denied absolute witness immunity for pretrial conduct that is merely preparatory to immunized testimony and has no independent impact on a defendant. The City has as much an interest in the resolution of this matter as the City of Chicago.

## SUMMARY OF THE ARGUMENT

The petition should be granted for three reasons. First, the question of immunity for pre-trial conduct that this matter presents is of profound importance for all municipalities, as suits premised on claims similar to those that gave rise to this matter are legion. Second, the decision of the Court of Appeals for the Seventh Circuit, if allowed to stand, practically obliterates the immunity long enjoyed by witnesses. Third, the Seventh Circuit's decision widens a divide among the federal courts of appeals on the issue presented, for now that court joins the Second Circuit as the only courts to deny immunity for the conduct of the sort presented here.

## ARGUMENT

### I. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE.

Section 1983 suits against municipal governments are hardly rare. As we have noted, in fiscal 2001, the City alone paid approximately $15 million in damages under 42 U.S.C. § 1983, and frequently indemnifies its police officers for section 1983 judgments arising from actions its officers undertake within the scope of their duties. Although New York and Chicago are two of this country's largest cities, every municipality with a police force is liable under section 1983 for the steps its police department takes in the never-ending fight against crime.

This fight does not stop with a suspect's arrest. Convictions are seldom secured without the testimony of some member of the police department, be it the arresting officer, an investigating detective, or a member of the police crime lab. Indeed, testifying at a suspect's trial -- and frequently at hearings on pre-trial motions too -- is an integral part of a police officer's job.

It takes no stretch of the imagination to understand that many defendants who are prosecuted in the criminal justice system are displeased with treatment by that system. Even if acquitted, many defendants see themselves as victims of that process, and become convinced they were mistreated by police, prosecutor, judge, or jury. While allegations of such mistreatment are usually groundless, the defendant's desire for compensation is quite real, and so the officers who testified against him frequently find themselves defendants in a section 1983 action.

Regardless of the validity of such suits, the police's crime-fighting mission would be severely compromised

were the officers civilly liable for the testimony they gave in court, or even the requisite pre-trial actions they took to make that testimony possible. This Court recognized this very fact when it held that police officers are entitled to absolute immunity from liability for monetary damages in actions under section 1983 for their allegedly perjurious testimony at criminal trials. See Briscoe v. LaHue, 460 U.S. 325, 341-47 (1983). As this Court noted, "[t]his category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources." Id. at 343. The cost of defending such cases would present great obstacles that very well may deter officers from zealously pursuing their duties, and prevent the government from allocating sufficient resources to the apprehension and prosecution of criminals. Indeed, as this Court recognized, even if the municipality or officer ultimately prevailed, the costs of defending that suit -- both financial and emotional -- are significant. See id. at 344.

The march of technology promises a surge in the filing of such cases. With increased use of DNA testing and similar processes, an increased number of incarcerated persons will be freed. These freed persons will understandably want financial recompense for their time of incarceration. Because prosecutors enjoy absolute immunity, municipalities and their police are certain to be targets in such suits, even when the police had acted in good faith, and simply lacked access to evidence generated by technologies yet to come into existence. A rule that exposes police officers to civil liability for pre-trial actions that are merely preparatory to immunized testimony would, perversely, saddle municipalities with huge financial liability for embracing cutting edge technologies to better ensure that only guilty defendants are convicted. This would, in turn, severely cripple a municipality's ability to employ these technologies.

## II. THE HOLDING BELOW EFFECTIVELY OBLITERATES ABSOLUTE WITNESS IMMUNITY.

If allowed to stand, the holding below will effectively abolish absolute witness immunity. Joseph Ienco ("Ienco') premises his due process claim on both the officers' pre-trial withholding of exculpatory information -- presumably the true facts about Ienco's search and seizure -- from the prosecutor, and on the officers' lying to the prosecutor by giving an untrue account of the arrest and search that would comport with the Fourth Amendment. (10a).[1] Telling a false story to the prosecutor in the pre-trial stage is inseparable from the telling of that story at trial. If an officer testifies falsely at a trial or a hearing, he or she as a matter of course has told that version of the facts to the prosecutor at the outset of the case. Indeed, the unavoidable first step in giving false testimony is the giving to the prosecutor of a preview of that testimony. Phrasing the claim as one of withholding the truth in the pre-trial stages of prosecution is just an attempt to defeat the absolute immunity of a witness. Hence, to preserve the well-established absolute immunity that witnesses enjoy, this immunity must be extended to pre-trial previews to prosecutors of false testimony.

If the Seventh Circuit is correct in the instant case, then witness immunity can almost always be nullified by creative pleading. The threat to witness immunity here is immediate and real. Understandably, persons who feel aggrieved by perjury in a trial or hearing have sought to evade the doctrine of witness immunity and to bring an action against the offending witness. Plaintiffs in section 1983 actions have engaged in clever parsing of events and

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[1] Unless otherwise indicated, numbers in parentheses with the suffix "a" refer to pages in the Appendices to the Petition for a Writ of Certiorari.

concepts to circumvent witness immunity. Perhaps the most-used stratagem in this regard, although not employed by respondent here, is to disavow suing for the perjury itself and to base one's claim instead on a pre-trial conspiracy to present perjured testimony. Although clever, this conceptual ploy, if accepted, would eviscerate the traditional absolute immunity of witnesses, in that most perjurious testimony can be alleged to have sprung from a conspiracy between the witness and either another witness or a prosecutor. But of course this problem is not limited to allegations of conspiracy. As the Petitioners note, under the holding below, immunity for testimony is eviscerated by permitting section 1983 plaintiffs to reframe claims based on perjured testimony as based instead on the failure of police witnesses to disclose prior to trial facts inconsistent with their testimony, regardless of whether a conspiracy among police -- or among police and prosecutors -- is alleged. See Petition For A Writ Of Certiorari at 13-15 [hereafter, "Petition"].

## III. THE HOLDING BELOW IS COUNTER TO THE DECISIONS IN THE MAJORITY OF THE FEDERAL CIRCUITS, WHICH HAVE EXTENDED WITNESS IMMUNITY TO PRE-TRIAL CONDUCT.

The Courts of Appeals have mostly, although not unanimously, rejected this tactic, and have held that the absolute immunity witnesses enjoy for even perjured testimony also covers pre-trial conduct that is inseparable from that testimony. As the Petitioner noted, at least eight circuits have held that absolute testimonial immunity extends to pre-trial misconduct aimed at producing perjured testimony. See Petition at 7-9.[2]

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[2] The Petition cites the following cases whose holdings directly conflict with the holding below: Mowbray v. Cameron County, 274 F.3d 269, 277-78 (5th Cir. 2001),

Prior to the instant case, the Court of Appeals for the Second Circuit stood alone in holding that a person can be sued pursuant to section 1983 for conspiracy to commit perjury in a prior trial or hearing despite the absolute immunity that covers the actual perjury. See San Filippo v. U.S. Trust Co. of New Jersey, Inc., 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985); Dory v. Ryan, 25 F.3d 81, 82 (2d Cir. 1994). It appears now that, in the instant case, the Court of Appeals for the Seventh Circuit has joined the Court of Appeals for the Second Circuit in not extending absolute immunity to pre-trial precursors of courtroom testimony. This Court should resolve this conflict in the law by adopting the law prevailing in the majority of the Courts of Appeals, especially given that the law in the other circuits that have addressed this issue does not eviscerate absolute witness immunity as the decisions in the Second and Seventh Circuits have done.

But regardless of how the split in the circuits is settled, it is preferable that this conflict be resolved so that this important question of immunity is put to rest. The law in this area is in conflict and characterized by rhetorical hair-splitting used to evade the absolute immunity of witnesses. The City -- and indeed all municipalities -- will be better able to formulate a comprehensive means of handling these claims and will be able to more intelligently allocate its resources if the borders of witness immunity are

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cert. denied, 122 S. Ct. 1912 (2002); Franklin v. Terr, 201 F.3d 1098, 1101-02 (9th Cir. 2000); Jones v. Cannon, 174 F.3d 1271, 1288-89 (11th Cir. 1999); Hunt v. Bennett, 17 F.3d 1263, 1267 (10th Cir.), cert. denied, 513 U.S. 832 (1994); Watterson v. Page, 987 F.2d 1, 9 (1st Cir. 1993); McArdle v. Tronetti, 961 F.2d 1083, 1085-86 (3d Cir. 1992); Miller v. Glanz, 948 F.2d 1562, 1570-71 (10th Cir. 1991); Alioto v. City of Shively, 835 F.2d 1173, 1174 (6th Cir. 1987); Moses v. Parwatikar, 813 F.2d 891, 892-93 (8th Cir.), cert. denied, 484 U.S. 832 (1987). See Petition at 7-8.

finally clearly drawn. This Court should accept this case as a vehicle to impose some order on this aspect of section 1983 jurisprudence.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.**

Respectfully submitted,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## REPLY BRIEF FOR THE PETITIONERS

## ARGUMENT

The parties are in agreement that Officers Angarone and McGann's actual testimony qualified for immunity. See Pet. 10-13; Resp. Br. 13, 22-23. They also agree that the officers would have lacked immunity altogether had respondent sued them for an unlawful search and seizure (Pet. 13 n.9; Resp. Br. 19 n.9), although, as the court of appeals acknowledged, respondent failed to bring such a claim within the applicable limitations period. See Pet. App. 11a. Thus, the parties' disagreement is over whether respondent can resuscitate a time-barred search and seizure claim by claiming that he was deprived of a fair trial in the underlying criminal case against him, and evade the officers' immunity for their testimony by focusing instead on the officers' alleged failure to disclose before trial information inconsistent with their subsequent testimony.

Respondent's claim that there is neither conflict nor confusion in the lower courts on the question presented by the petition is flatly incorrect, as we explain below. Equally important, however, is respondent's silence on what is perhaps the most compelling reason to grant the petition—the holding below, if unreviewed, effectively eviscerates the testimonial immunity of police officers recognized in *Briscoe v. LaHue*, 460 U.S. 325 (1983). While respondent claims that the holding in this case does not eliminate immunity for claims of police perjury (*e.g.*, Resp. Br. 13, 19), he ignores the reality that "[a] claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested." *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976). See Pet. 13-16. Thus, plenary review is appropriate here if for no other reason than to determine whether the immunity doctrine recognized in *Briscoe* is, in practical effect, to survive.

1. Respondent boldly claims that the circuits "are in perfect unanimity that pre-testimonial misconduct by law enforcement officials does not become retroactively immunized by the expedient of testifying." Resp. Br. 1. But in the most obvious terms, there is not unanimity. Respondent's view has been accepted in the Second Circuit, in that court's decision in *San Filippo v. U.S. Trust Co. of New Jersey, Inc.*, 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985), and is now the law in the Seventh Circuit by virtue of the holding below. But the holding in *San Filippo* has been expressly repudiated by a number of other circuits. See, *e.g.*, *Franklin v. Terr*, 201 F.3d 1098, 1102 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d 1271, 1288 (11th Cir. 1999); *Miller v. Glanz*, 948 F.2d 1562, 1570-71 (10th Cir. 1991). That alone should make plain that respondent's claim of "unanimity" in the circuits is unsupportable.

Respondent dismisses the cases that we identified in the petition as being in conflict with the decision below by

claiming that none of them "addresses the applicability of testimonial immunity to misconduct by a police officer followed by the officer's testimony in a trial or adversarial pre-trial proceedings." Resp. Br. 18 (emphasis deleted). To the contrary, in each of the cases we identify in the petition, testimonial immunity was held to reach pretrial misconduct aimed at producing perjurious testimony. See Pet. 7-8. In *Franklin*, for example, the court held that a witness's pretrial meetings with other witnesses in an effort to ensure that they testified consistently at trial was within the scope of testimonial immunity. See 201 F.3d at 1102. In *Jones*, the court held that police detectives' meetings with a potential witness in order to suborn the witness's subsequent perjured testimony were immunized. See 174 F.3d at 1288-89. In *Alioto v. City of Shively*, 835 F.2d 1173 (6th Cir. 1987), the court held that immunity applied to a conspiracy to commit perjury that "took place well before [the defendants] actually gave their testimony, i.e., during the investigative stage . . . ." *Id.* at 1174. And in *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993), a witness was afforded testimonial immunity even though the complaint alleged that the witness had conspired to conceal material information that she had learned during the course of her pretrial investigation. See *id.* at 9. Each of these decisions is wholly inconsistent with respondent's view that testimonial immunity can never reach pretrial misconduct, and equally inconsistent with the Seventh Circuit's holding in this case that "no absolute testimonial immunity attaches to the actions of the officers outside of trial . . . ." Pet. App. 10a.

Respondent also attempts to put aside cases holding that pretrial misconduct alleged to be part of a conspiracy to commit perjury falls within the scope of testimonial immunity. These, he claims, rest only "on the principle that a person may not be prosecuted for conspiracy to commit an act that he may perform with impunity." Resp. Br. 18-19 (footnote omitted). But not all of the cases on which we rely

involve conspiracy claims. Moreover, the principle that immunity cannot be circumvented by suing for acts that are themselves merely preparatory to an immunized act is not limited to conspiracy. In *Imbler*, for example, this Court refused to recognize an exception to prosecutorial immunity for a prosecutor's failure to disclose exculpatory information prior to trial, since the failure to disclose exculpatory information was merely preparatory to the immunized act of presenting allegedly perjured testimony at trial. See 424 U.S. at 431 n.34. In *Jones*, the Eleventh Circuit likewise recognized that immunity reaches pretrial acts that are preparatory to testimony even when the plaintiff's claim is not for conspiracy. In that case, the plaintiff attempted to avoid immunity by characterizing his claim as based on pretrial subornation rather than a conspiracy to commit perjury, yet the court found immunity equally applicable: "Although Jones presses a claim that Powers suborned the perjured testimony from a trial witness and not a claim for conspiracy to present perjured testimony at trial, we believe the reasoning of these cases [recognizing immunity on conspiracy claims] applies equally here." 174 F.3d at 1288-89 (footnotes omitted). Similarly, in *Watterson*, the First Circuit recognized immunity on claims of both conspiracy and an alleged failure to disclose material facts to the court. See 987 F.2d at 9.

In short, the Second and Seventh Circuits have refused to recognize testimonial immunity for pretrial conduct, while other circuits have held that pretrial conduct aimed at producing allegedly perjured testimony—whether characterized as a conspiracy, subornation, or a failure to disclose material information—qualifies for immunity. There is, quite plainly, conflict, not unanimity, in the circuits.

2. In what is presumably an effort to demonstrate that the decision below is consistent with something more substantial than the Second Circuit's much criticized opinion in *San*

*Filippo*, respondent cites a number of other cases that he contends supports the decision below. These cases, in fact, have little if anything to do with the question presented in this case.

Respondent invokes a large number of decisions based on the so-called complaining witness doctrine, which denies immunity to those responsible for an unlawful arrest. In *Malley v. Briggs*, 475 U.S. 335 (1986), for example, the Court held that an officer was not immune for his sworn complaints and supporting affidavits seeking arrest warrants that were allegedly unsupported by probable cause, applying the common law doctrine denying immunity to "one who procured the issuance of an arrest warrant . . . maliciously and without probable cause . . . ." *Id.* at 340-41. Similarly, in *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court applied the complaining witness doctrine to deny immunity to a prosecutor who provided sworn testimony in support of an arrest warrant that was allegedly false and unsupported by probable cause. See *id.* at 129-31. But these cases, and the complaining witness doctrine itself, lend no support to the decision below. For one thing, the Seventh Circuit expressly disavowed any reliance on the complaining witness doctrine in the decision below. See Pet. App. 10a n.9. For another, as the opinions in *Malley* and *Kalina* make plain, the complaining witness doctrine is applicable only to actions challenging the validity of an arrest, while respondent's claim does not challenge his arrest, but instead asserts that he was denied his right to a fair trial. See Pet. App. 7a-8a. Thus, these cases do not address the conflict in the circuits over the scope of immunity when the complaining witness doctrine is inapplicable.[1]

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[1] In any event, even the potential applicability of the complaining witness doctrine argues for and not against plenary review here. As we explain in the petition, the circuits are split on whether the complaining witness doctrine defeats testimonial immunity in cases like this one. See

Indeed, most of the decisions that respondent cites are no more than applications of the complaining witness doctrine. *White v. Frank*, 855 F.2d 956 (2d Cir. 1988), for example, involved grand jury testimony, and the court expressly rested its holding on the complaining witness doctrine. See *id.* at 960-61. In *Anthony v. Baker*, 767 F.2d 657 (10th Cir. 1985), the court also held that grand jury testimony is not immunized. See *id.* at 663-64. The court's subsequent opinion in that case, moreover, made clear that grand jury testimony lacks immunity because of the complaining witness doctrine. See *Anthony v. Baker*, 955 F.2d 1395, 1399-1400 (10th Cir. 1992). Similarly, in *McArdle v. Tronetti*, 961 F.2d 1083 (3d Cir. 1992), the court held that the filing of an allegedly false civil commitment petition involved the initiation of a judicial proceeding and therefore was not within testimonial immunity. See *id.* at 1085-86.[2] To similar effect are *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984), in which immunity was denied on a claim that an officer had procured an arrest warrant that was unsupported by probable cause (see *id.* at 31), and *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir.), modified, 744 F.2d 1131 (1984), in which the court held that statements made at a non-adversarial probable cause hearing inquiring into the justification for an arrest are not immunized (see *id.* at 261).[3] The portion of the Eleventh Circuit's decision in *Jones* denying an officer immunity for an affidavit seeking an arrest

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Pet. 9 n.6. And even respondent does not deny the existence of a conflict in the circuits on this point.

[2] The court also held, however, that immunity reached McArdle's allegations that the defendants engaged in a pretrial conspiracy "to have him falsely diagnosed as a paranoid schizophrenic." 961 F.2d at 1085.

[3] The Fifth Circuit expressly limited the holding in *Wheeler* to nonadversarial hearings evaluating the propriety of an arrest in *Moore v. McDonald*, 30 F.3d 616 (5th Cir. 1994), where it also held that testimony at a suppression hearing—the type of proceeding at issue here—is immunized. See *id.* at 619-20.

warrant was also based on the complaining witness doctrine. See 174 F.3d at 1284-85. All of these cases applying the complaining witness doctrine to false arrest claims are wholly inapplicable here.[4]

Equally irrelevant are cases denying immunity to non-testimonial misconduct, such as the holding in *Jones* denying immunity to a detective alleged to have fabricated boot print evidence against an accused (see 174 F.3d at 1289-90), and the holding in *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), denying immunity to defendants alleged to have fabricated tape-recorded evidence (see *id.* at 998-99, 1002-04). Even respondent does not identify any physical evidence that Officers Angarone and McGann allegedly fabricated; the only evidence that respondent contends was fabricated was the officers' own testimony. See Resp. Br. 4-7.[5]

Indeed, if anything, the holding in *Spurlock*, in particular, reinforces the need for plenary review in this case. In *Spurlock,* the Sixth Circuit held that subornation of perjury

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[4] *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992), is even further afield. In that case, the court remanded for further proceedings because it could not tell whether the defendant claiming immunity was a complaining witness. See *id.* at 511-12. And in *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), which involved prosecutorial and not witness immunity, the court pointed out that the defendant had not asserted an immunity defense on a claim that he had fabricated evidence against an accused. See *id.* at 1467.

[5] Of course, a plaintiff cannot invoke the exception to immunity for nontestimonial conduct unless he identifies some evidence nontestimonial in character that the defendant fabricated. For example, in *Alioto*, the Sixth Circuit observed:

> Although the doctrine of witness immunity does not shield from liability alleged conspiracy to falsify nontestimonial evidence, the only facts asserted by Alioto concerned defendants' alleged conspiracy to give false testimony. Accordingly, this argument is also without merit.

835 F.2d at 1174 n.1.

does not fall within the ambit of testimonial immunity. See 167 F.3d at 1001-02. That holding is inconsistent with the Eleventh Circuit's subsequent decision in *Jones*, recognizing immunity on subornation claims. See 174 F.3d at 1288-89. Thus, perhaps inadvertently, respondent's reliance on *Spurlock* only highlights the extent to which there is confusion and, indeed, outright conflict in the circuits on the question presented in the petition.

Respondent's reliance on the two remaining cases that he cites is particularly misleading. In *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988), while the court assumed that testimonial immunity did not reach pretestimonial conduct, it did so without any analysis of that issue (see *id.* at 424-25), and the Eleventh Circuit subsequently retreated from that position in *Jones*, as we explain above. And although respondent is correct that in *Mastroianni v. Bowers*, 160 F.3d 671 (11th Cir. 1998), the court held that testimonial immunity will not reach a pretestimonial conspiracy (see *id.* at 678 n.5), the court reconsidered that holding on rehearing, ultimately concluding that immunity will reach even pretrial misconduct when the plaintiff's claims "are supportable . . . only by consideration of the actual contents of the allegedly perjured testimony . . . ." *Mastroianni v. Bowers*, 173 F.3d 1363, 1367 (11th Cir. 1999). And as we explain in the petition and reiterate below, that proposition is fully applicable to this case.

3. Respondent defends the decision below by claiming that immunity is limited to "the performance of functions 'intimately associated' with the judicial process." Resp. Br. 10 (quoting *Malley*, 475 U.S. at 342). He then argues that the claims in this case lack an association with the judicial process, because they "are not based on the officers' perjured testimony." Resp. Br. 13 (quoting Pet. App. 10a). To make this argument, however, respondent ignores virtually everything we have to say on this subject in the petition.

As we explain in the petition, respondent's claim that he was denied his right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963), is wholly and inextricably tied to the judicial process, since such a claim can only be based on what occurs at an accused's trial. See Pet. 10-12. We also explain that respondent's claim necessarily rests on the officers' testimony; had they not testified they could not have deprived respondent of his right to a fair trial. See Pet. 12-13. But respondent wholly ignores our submission. While he asserts that his constitutional claim is based on pretrial misconduct, he does not even attempt to explain how he could have been deprived of his right to a fair trial through pretrial misconduct alone. The constitutional claim that he brought—the only one on which he had not blown the statute of limitations—necessarily depends on the officers' testimony, which even respondent concedes is sufficiently intertwined with the judicial process as to qualify for immunity. Indeed, that was the square holding in *Briscoe*.

4. We also explain in the petition that the practical effect of the holding below is to wholly eviscerate the doctrine of testimonial immunity, since plaintiffs will always be able to refashion claims based on perjured testimony as instead based on a police officer's failure to disclose exculpatory information about his own anticipated testimony prior to trial. See Pet. 13-16. Respondent, rather than answering this point, makes a confusing response that ultimately seems to advocate the effective overruling of *Briscoe*.

First, respondent, citing cases applying the complaining witness doctrine, observes that not all sworn statements of police officers receive immunity. See Resp. Br. 23-25. That is entirely beside the point. While not all sworn statements of police officers are immunized, at least some are—and as this Court held in *Briscoe,* immunity unquestionably attaches to an officer's testimony at trial. Respondent, however, does not even attempt to explain how *Briscoe* will remain applicable to

any cases at all, given the ability of plaintiffs to recharacterize any claim based on perjured testimony as instead based on an officer's pretrial failure to disclose exculpatory information.

Second, respondent claims that the costs of defending the claims against police officers that will be permitted under the holding below should be appropriately shifted to the taxpayers in order to deter misconduct. See Pet. 25-26. This, however, is precisely the kind of burden that this Court rejected in its holding in *Briscoe*. See 460 U.S. at 342-45.[6] While respondent may believe that the burdens of defending this type of litigation are appropriately imposed on police officers and the taxpaying public, in *Briscoe* the Court struck the balance differently. The court of appeals should not be permitted to effectively undo *Briscoe* by permitting plaintiffs to reframe claims based on perjured testimony as instead based on a pretrial failure to disclose exculpatory evidence.

## CONCLUSION

The petition for writ of certiorari should be granted.

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[6] Moreover, as Professor Levinson has demonstrated, it is far too simple to expect that passing along the costs of civil litigation to the tax-paying public will create an effective means of deterring constitutional violations. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 361-87 (2000).

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